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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, AS PRESIDENT OF THE YONKERS COMMITTEE FOR PEACE, AN UNINCORPORATED ASSOCIATION, PETITIONER,

vs.

WILLIAM DIXON, ET AL., AS MEMBERS OF THE BOARD OF EDUCATION OF THE CITY OF YONKERS, ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION

PETITION FOR CERTIORARI FILED JANUARY 14, 1954

CERTIORARI GRANTED MARCH 15, 1954

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STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

COUNTY OF WESTCHESTER

—o—

In the Matter
of
The Application of JAMES R. ELLIS, as President of the YONKERS COMMITTEE FOR PEACE, an unincorporated association,
Appellant,
against
WILLIAM DIXON, JR., *et al.*, as members of the Board of Education of the City of Yonkers, etc.,
Respondents.

—o—

Notice of Appeal.

Sir:

PLEASE TAKE NOTICE, that the appellant above-named, does hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, from the order entered in the Office of the Clerk of the County of Westchester, on the 28th day of January, 1953, which denied the above-entitled application and from each and every part of said order.

Dated: New York, N. Y., January 30, 1953.

EMANUEL REDFIELD,
Attorney for Appellant,
60 Wall Street,
New York 5, N. Y.

Notice of Appeal.

4 To:

Clerk of the County of Westchester,

J. Raymond Hannon, Esq.,
Corporation Counsel,
Attorney for Respondents,
City Hall,
Yonkers, New York.

5

6

Order Appealed From.

At a Special Term, Part I of the Supreme Court, held in and for the County of Westchester, at the County Court House in the City of White Plains, N. Y., on the 22nd day of January, 1953. 7

Present: Hon. Frank H. Coyne,

Justice.

—o—

In the Matter
of
The Application of JAMES R. ELLIS, as President of the YONKERS COMMITTEE FOR PEACE, an unincorporated association, 8

against

WILLIAM DIXON, JR., JOHN N. DILL, ABRAHAM H. ELKIND, WALTER J. GALLAGHER, ROBERT H. HUSTON, WILLIAM F. LALLY, VIRGINIO MINERVINI, JAMES G. PARK and WILLIAM W. SCHWARTZ, as members and trustees of the Board of Education of the City of Yonkers, for an order pursuant to Article 78 of C. P. A. directing the said Board to permit the said unincorporated association the use of a schoolhouse in Yonkers pursuant to Section 414 of the Education Law, 9

Respondents.

—o—

The above named petitioner having moved this Court by a Notice of Motion dated December 9, 1952, for an order, pursuant to Article 78 of the Civil Practice Act, directing the Respondents to permit it to use a schoolhouse in the City of Yonkers, and the Respondents having, pursuant to Section 1293 of the Civil Practice Act, duly served

notice that an application would be made upon the return day of said proceeding for an order dismissing the said petition because of objections in point of law, which notice was dated December 16, 1952, and the matter having come on for argument before this Court on the 19th day of December, 1952, and Emanuel Redfield, Esq., attorney for Petitioner, having been heard in support of motion and J. Raymond Hannon, Esq., Corporation Counsel of the City of Yonkers and attorney for the Respondents, having been heard in opposition thereto,

On reading and filing the petition, verified the 19th day of December, 1952, the notice of motion, dated December 9, 1952, and the notice of motion to dismiss the petition, dated December 16, 1952, and due deliberation having been had thereon.

Now, on motion of J. Raymond Hannon, Corporation Counsel of the City of Yonkers and attorney for the Respondents, it is

Ordered that the petitioner's application be and the same hereby is in all respects denied, and it is further

Ordered that Respondents' cross motion to dismiss the petition be and the same hereby is in all respects granted.

Enter,

FRANK H. COYNE,
J. S. C.

Notice of Motion.

(Same Title.)

Sir:

PLEASE TAKE NOTICE, that upon the annexed petition of James R. Ellis, sworn to the 9th day of December, 1952, the undersigned will move this Court at a Special Term, Part One of this Court at 166 Main Street, White Plains, New York, on the 19th day of December, 1952, at 10:00 A. M. or as soon thereafter as counsel can be heard for an order directing the respondents to permit the petitioner's organization the use of a school house in Yonkers, New York, at a time and place to be fixed in the order pursuant to Section 414 of the Education Law and for such other and additional relief as to the Court may seem just.

Dated: December 9, 1952.

Yours, etc.,

EMANUEL REDFIELD,
Attorney for Petitioner,
60 Wall Street,
New York 5, N. Y.

Petition.

(Same Title.)

To the Supreme Court of the State of New York:

The petition of James R. Ellis, respectfully shows this Court:

Petition.

16 1. That petitioner is the President of the Yonkers Committee for Peace, an unincorporated association.

2. That said unincorporated association was formed among residents and citizens of the City of Yonkers and of Westchester County for the object of arranging forums for the discussion of problems relating to peace against war. The objects of this group can best be stated from the statement of purposes of the organization which was drafted at the time it was organized:

17 "We have a choice between life in peace, or death by war. There is no third choice. In the event of an atomic war, the front line will not be thousands of miles away but right at our front doors. You may be a victim.

We realize that there are differing views on the causes and solutions of the world's troubles, but we firmly believe that war is not the cure for any of them. Winter, Spring, Summer and Fall are inevitable. We believe that war is not. War is man-made and can

18 be undone by man.

This is our aim; this is our cause * * * STOP WAR. Here is how we think it can be done.

1. As Americans we have the privilege of letting our representatives in Washington know how we feel about any matter. The price of a post-card is the cost to you. It's a very good investment.
2. We also have the right to let the press and radio know of our feelings toward any of

their propaganda drives. Right now they are drumming for war. Let them know how you feel about it.

3. It is our privilege and our duty to hear both sides of every issue before making a decision. Your daily press is one side of this war issue. Any of numerous peace groups in every section of our land can give you the other side.

4. Taxes are collected by the government to improve the welfare of the American people. For our tax money we can have armed camps throughout the entire world, or better schools, better homes and lower living costs. Which do you want? Let your Congressman know, your friends and everyone you come in contact with. This is our birthright, and to fear open discussion is more un-American than any difference of opinion amongst us could possibly be.

This country of the people, by the people, and for the people shall indeed remain free if we all exercise our rights as citizens."

3. That at all times hereinafter mentioned the respondents, William Dixon, Jr., John N. Dill, Abraham H. Elkind, Walter J. Gallagher, Robert H. Huston, William F. Lally, Virginio Minervini, James G. Park and William W. Schwartz, were and still are members and trustees of the Board of Education of the City of Yonkers.

4. Petitioner at all times hereinafter mentioned was and still is a citizen of the United States and a resident of Yonkers, New York.

22 Petitioner's occupation is that of being engaged in the carpet and rug cleaning business.

5. That on May 14, 1952, petitioner applied to the respondents duly executed on its form for that purpose for permission to use the auditorium of Saunders Trade School or any other school for the purpose of a forum for the discussion of peace and war.

6. Under date of May 28, 1952, the respondents replied:

23 "Your application of May 14, 1952, for permission to use the auditorium of the Saunders Trade School or any other school has not been approved, and I sincerely regret that I am unable to grant the desired permission. Yours very truly, George Scheele, Jr., Secretary."

7. On June 23, 1952, petitioner wrote to the respondents as follows, asking for the reason for the refusal:

24 "This is in answer to your letter of May 28th. This Committee is surprised and disappointed that the Board of Education of Yonkers has not seen fit to approve our application of May 14th, for the use of the auditorium of the Saunders Trade School, or any other school for a lecture and forum.

"By vote of our committee, I have been instructed to inquire of the Board of Education, the reason or reasons for refusing to approve the request of this committee.

"Will you please let me know at your earliest convenience, why the request was turned down. 25

Yours very truly,

YONKERS COMMITTEE FOR PEACE,
JAMES R. ELLIS, Chairman."

8. To this letter, respondents replied as follows:

"Your letter of June 23, 1952, inquiring as to the reason or reasons for the refusal of the Board of Education to grant your request 26 for the use of the Saunders Trade School, has been received and will be presented to the Board of Education at its next regular meeting scheduled to be held on July 10, 1952. Yours very truly, George Scheele, Jr., Secretary."

9. Thereafter on July 11, 1952, the respondents replied that the matter was referred to the Superintendent of Schools:

"Your letter of June 23, 1952, was presented to the Board of Education at its meeting held on July 10, 1952, and was referred to the Superintendent of Schools. Yours very truly, George Scheele, Jr., Secretary." 27

10. Thereafter on August 14, 1952, the Superintendent of Schools replied that the application was denied, without comment, as follows:

"The Board of Education has referred to me your communication for reply. The request of your Committee was presented to the Board of Education, which group has the

28 sole authority to grant permission for the use of schools. The application was denied by the Board of Education without comment. Very truly yours, Stanley S. Wynstra, Superintendent of Schools."

11. On October 31, 1952, petitioner again applied and duly executed a form supplied therefore by respondents for the use of the auditorium of Public School No. 13 in Yonkers, New York, for December 3, 1952, or December 5, 1952.

29 12. On November 7, 1952, your petitioner received a communication from respondents denying the use, without explanation, as follows:

"Your application of October 31, 1952, for use of the auditorium of Public School No. 13, was presented to the Board of Education at a meeting held November 6, 1952. The Board of Education did not approve said application and I, therefore, regret that I am unable to grant the desired permission. Yours very truly, George Scheele, Jr., Secretary."

30

13. On November 13, 1952, petitioner appeared before a public meeting of the respondents at which meeting petitioner protested the aforesaid refusal, but respondents failed and still refuse to grant permission for the use of the schoolhouse to said Yonkers Committee for Peace.

14. That pursuant to Section 414 of the Education Law of the State of New York, the respondents, and/or their predecessors, as members of the Board of Education of the City of Yonkers, adopted regulations for the use of the school-

houses, grounds or other property when not in use for school purposes in Yonkers, New York, whereby organizations at all times herein mentioned were and are permitted the use of the school buildings when not in use.

15. That at all times herein mentioned and at all times since the adoption of the aforesaid regulations, the school buildings, grounds and property of and in the City of Yonkers have on numerous occasions (whose number are best known to respondents and at such numerous times and occasions that the practice is an accepted practice) been permitted to be used pursuant to Section 414 of the Education Law by organizations for the purpose of public assembly and discussion.

16. That at no time herein mentioned did the respondents inform petitioner of the reason for the denial of his application, nor did they ask petitioner or his organization to fulfill any further requirements or conditions for permission to use by them of a school building in Yonkers, New York, for purposes of public assembly or discussion.

17. That by reason of the action of the respondents in failing to give a reason for its action whereas permission is freely granted to others applying, it is evident that the respondents are concealing a design to discriminate against petitioner and his said organization, for which discrimination there is no foundation in law or fact, and that the acts of respondents are arbitrary and unreasonable.

18. The action of respondents violates the
34 right of petitioner and the constituent members of his organiza ion of freedom of speech and assembly guaranteed by the Constitution of the United States and denies them the equal protection of the laws in violation of the Constitution of the United States.

WHEREFORE, petitioner prays that this Court grant an order requiring respondents to grant permission to petitioner's aforesaid organization for the use of a school building in
35 Yonkers, New York, at a time and place to be fixed on the settlement of the order.

Dated: New York, N. Y., December 9, 1952.

JAMES R. ELLIS,
Petitioner.

(Verified December 9, 1952.)

Notice of Cross Motion.

(Same Title.)

36

Sir:

PLEASE TAKE NOTICE that upon the notice of motion herein, dated the 9th day of December, 1952 and the petition of James R. Ellis, verified the 9th day of December, 1952, upon which the said notice of motion was based, a motion will be made by respondents at a Special Term, Part I, of the Supreme Court of the State of New York to be held in and for the County of

Westchester at the County Court House in the 37
City of White Plains, N. Y., on the return day of this proceeding, to wit: on the 19th day of December, 1952, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the petition herein as a matter of law upon the following grounds:

1. That the petition is insufficient in law in that it does not state facts sufficient to constitute grounds for the relief sought therein.

2. That the petition fails to show a clear legal 38
right of petitioner to the relief demanded or to any other relief on the merits.

3. That the petition does not state facts to establish that respondents have failed to perform a duty specifically enjoined upon them by law.

4. That the refusal of respondents to grant permission to petitioner's organization for the use of a school building in Yonkers, New York, can be adequately reviewed by an appeal to the Commissioner of Education of the State of New 39
York.

WHEREFORE, respondents respectfully pray that the relief sought by the petitioner herein be denied and that the petition be dismissed with costs.

Dated: Yonkers, N. Y., December 16, 1952.

Yours, etc.,

J. RAYMOND HANNON,
Corporation Counsel,
Attorney for Respondents,
Office & P. O. Address,
City Hall,
Yonkers, N. Y.

Opinion of Coyne, J., N. Y. Law Journal 1/15/53. Vol. 129, P. 160.

40

To:

Emanuel Redfield, Esq.,
Attorney for Petitioner,
Office & P. O. Address,
60 Wall Street,
New York 5, N. Y.

Opinion of Coyne, J., N. Y. Law Journal 1/15/53. Vol. 129, P. 160.

41 Ellis v. Dixon—This is a proceeding under Article 78 of the Civil Practice Act for an order directing the Board of Education of the City of Yonkers to permit petitioner's organization, the Yonkers Committee for Peace, an unincorporated association, the use of a schoolhouse in the City of Yonkers.

The petition alleges in substance that petitioner, on behalf of his organization, made applications to the respondent Board of Education on
42 two occasions for permission to use an auditorium of one of the schools for the purpose of conducting a forum for the discussion of problems relating to peace and war; and that both of the applications were denied; that respondents did not inform petitioner of the reason for denial of permission; that respondents are concealing a design to discriminate against petitioner and his organization; and that the acts of respondents are arbitrary and unreasonable, and in violation of petitioner's constitutional rights.

Opinion of Coyne, J., N. Y. Law Journal 1/15/53. Vol. 129, P. 160.

43

On the return of the petition, before the service of an answer, respondents have moved under section 1293, C. P. A., to dismiss the petition as a matter of law. Respondents urge three grounds for dismissal, namely: (1) That the petitioner has failed to show a clear legal right to the relief demanded, (2) that the petition does not state facts establishing that respondents have failed to perform a duty specifically enjoined upon them by law, and (3) that the determination of the Board of Education can adequately be reviewed by an 44
appeal to the Commissioner of Education.

Without prejudging the merits of the controversy at this stage, a few observations with respect to the extent of the discretionary power of the administrative body may be in order. The law is well established that the acts of a board of education in granting or refusing to grant permission for the use of a schoolhouse, out of school hours, are discretionary (sec. 414, Education Law); and the courts will not interfere with this discretion 45
unless the action of the board is essentially arbitrary. Many factors may be taken into consideration by the administrative body in making its determination. The board is presumed to have knowledge of local conditions and to know the sentiment of the taxpayers and voters in the district. Assuming that a proposed use is in itself legitimate, a board of education may still find that the sentiment of the community is divided as to the propriety of the use and may properly refuse

46 a request, the granting of which would result in dissatisfaction and criticism (Matter of Women's Civic Club of Katonah, Inc., 31 State Dept. Rep., 396, 397; Matter of Vernon High School Alumni Association, 15 State Dept. Rep., 476).

In this connection a quotation from Appeal of American Civil Liberties Union (36 State Dept. Rep., 97, 98) is apropos. It was there stated: "Schools are established and maintained for a definite and specific purpose, to wit, the secular
47 education of the youth of the State, and any activity within the scope of that purpose or tending to promote the welfare of the schools and the community should be allowed and encouraged. On the other hand, any activity which is not embraced in the general school program and which is of a controversial nature liable to arouse ill feeling, jealousy or dissension, or to lead to misunderstanding, should be rigidly debarred. By pursuing this policy in the past our public schools have maintained the confidence and respect of all
48 elements, classes, creeds and factions. The public schools are supported by the whole body of citizens; within their walls assemble the children of the rich and the poor, the children of parents of every shade of religious belief and unbelief. The children of almost every race and color. Therefore, nothing that will tend to foster intolerance, bigotry, animosity or dissension should be allowed to inject itself into the public school system of this great State."

Opinion of Coyne, J., N. Y. Law Journal 1/15/53. Vol. 129, P. 160.

49

The objects and purposes of petitioner's organization, as set forth in the petition, and the proposed subject of the forum discussions, impress this court as being of an essentially controversial nature.

Quite apart from the general principles above stated, the within application must be disposed of on a purely procedural ground. Generally speaking, any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is authorized and required to ex- 50
amine and decide the same (Education Law, section 310). Section 1285, subdivision 4, of the Civil Practice Act, declares that, except as otherwise provided by statute, the procedure under article 78 shall not be available to review a determination where it can be adequately reviewed by an appeal to a court or some other body or officer. Section 310 of the Education Law authorizes an appeal to the commissioner of education in consequence of any action by an official therein named or by any other official act or decision of any offi- 51
cer, school authorities, or meetings concerning any other matter or any other act pertaining to common schools. It is authoritatively stated that the commissioner of education is by the Legislature recognized as having judicial functions. The purpose of the statute was to make all matters pertaining to the general school system of the state within the authority and control of the department of education and to remove the same as

52 far as practicable and possible from controversies in the courts (Bullock v. Cooley, 225 N. Y., 566). This sound policy assures consideration and determination by a person peculiarly conversant with school problems.

Where, as here, the denial of permission to use a schoolhouse involved the exercise of a discretionary power by the respondent board of education, it is the opinion of this court that an appeal to the commissioner of education is the ex-
53 clusive remedy of petitioner. In making this determination, the court is not unmindful of the authorities holding that the provisions of section 310 of the Education Law do not preclude redress to the court *in a proper case* (italics supplied for emphasis). In most, if not all, of the situations where the court assumed jurisdiction, the right of the party aggrieved involved the interpretation of a statute, or involved a situation where the administrative officer or body proceeded to act in
54 violation of an express statute. That, of course, is not the situation at bar.

Under all of the circumstances, the court deems it provident to grant respondents' motion to dismiss the petition on the third ground stated; without prejudice to petitioner's right to appeal to the commissioner of education, and without prejudice to his further right to seek a review of the commissioner's determination, if he believes it to be arbitrary (Matter of Levitch v. Board of Education, 243 N. Y., 373; Matter of Fabricius v. Graves,

254 App. Div., 19). In view of the foregoing, no 55
disposition need be made of the remaining grounds for dismissal urged by respondent.

Submit final order accordingly.

Stipulation Waiving Certification.

(Same Title.)

Pursuant to Section 170 of the Civil Practice Act, IT IS HEREBY STIPULATED that the foregoing case on appeal contains true copies of 56
the Notice of Appeal, Order Appealed From, Notice of Motion, Petition, Notice of Cross Motion, Opinion and the whole thereof now on file in the office of the clerk of the County of Westchester and certification thereof by said clerk is hereby waived.

Dated: February ...., 1953.

J. RAYMOND HANNON,
Attorney for Respondents. 57

EMANUEL REDFIELD,
Attorney for Appellant.

Order of Appellate Division Denying Leave to Appeal to Court of Appeals.

58

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 18th day of May, 1953.

Present: Hon. Frank F. Adel,
Acting Presiding Justice.

Henry G. Wenzel, Jr.,
59 John Mac Crate,
Frederick G. Schmidt,
George J. Beldock,
Justices.

———o———

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Appellant,

against

60 WILLIAM DIXON, JR., *et al.*, as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

———

Order on Motion for leave to appeal to the Court of Appeals.

———o———

The above named James R. Ellis, as President of the Yonkers Committee for Peace, etc., the

Order of Appellate Division Denying Leave to Appeal to Court of Appeals.

61

appellant in this proceeding, having made a motion for leave to appeal to the Court of Appeals; and the motion having been duly submitted:

Now on reading and filing the papers in support of and in opposition to said motion; and all the papers upon which the appeal was heard; and due deliberation having been had thereon:

IT IS ORDERED that the said motion be and the same hereby is denied.

62

Enter:

JOHN J. CALLAHAN,
Clerk.

63

Order of Court of Appeals Denying Leave to Appeal.

64

STATE OF NEW YORK

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-second day of October A. D. 1953.

Present: Hon. Edmund H. Lewis,
Chief Judge, Presiding.

65

Mo. No. 339.

In the Matter
of
The Application of JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,
Appellant,

vs.

WILLIAM DIXON, JR., & ors., as members of
66 the Board of Education of the City of Yonkers, &c.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied within ten dollars costs and necessary printing disbursements. 67

A Copy.

GEARON KIMBALL,
(Seal) Deputy Clerk.

Order of Affirmance.

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 20th day of April, 1953. 68

Present: Hon. Gerald Nolan,
Presiding Justice.

" William B. Carswell,
" Henry G. Wenzel, Jr.,
" Frederick G. Schmidt, 69
" George J. Beldock,
Justices.

The above named James R. Ellis, as President of the Yonkers Committee for Peace, an unincorporated association, petitioner in this proceeding having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Westchester on the 28th day of Janu-

70 ary, 1953, denying petitioner's application to compel respondents to grant permission for the use of a school building by an unincorporated association, and granting respondents' cross-motion to dismiss the petition, herein, and the said appeal having been argued by Mr. Emanuel Redfield of Counsel for appellant, and argued by Mr. J. Raymond Hannon, Corporation Counsel, of Counsel for respondents, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore
71 filed:

IT IS ORDERED that the order so appealed from be and the same hereby is unanimously affirmed, with $10. costs and disbursements.

Enter:

JOHN J. CALLAHAN,
Clerk.

Supreme Court of the United States, October Term, 1953

No. 534

James R. Ellis, as President of the Yonkers Committee for Peace, an Unincorporated Association, Petitioner,

vs.

William Dixon, et al., as Members of the Board of Education of the City of Yonkers, etc.

Order Allowing Certiorari—Filed March 15, 1954

The petition herein for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Department is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U.S.

Office Supreme Court, U. S.
FILED
JAN 14 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted] 80

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, *et al.*, as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

EMANUEL REDFIELD,
60 Wall Street,
New York, New York.

BATAVIA TIMES LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

Docket No. .....

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, *et al.*, as member of the Board of Education of the City of Yonkers, etc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

Your petitioner, James R. Ellis, by Emanuel Redfield, his attorney, prays that a Writ of Certiorari issue to review the judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

The petitioner commenced a proceeding in the Supreme Court, State of New York, County of Westchester, pursuant to Article 78, Civil Practice Act, to require respondents to permit petitioner unincorporated organization to

use school property for public forums as was permitted by respondents to other persons and organizations. The application was denied by Special Term on the ground that the subject of the forum, peace, was controversial and further, petitioner should have resorted to an appeal to the Commissioner of Education. The Appellate Division, Second Department, upon appeal to it, affirmed the order on April 20, 1953, but held that the proceeding was properly brought before the court below. Nevertheless, the Appellate Division held that "the petition does not allege facts which allege a clear legal right to the relief sought nor which establish that respondents failed to perform a duty enjoined by law." The Appellate Division by order dated May 18, 1953, denied leave to appeal to the Court of Appeals. On October 22, 1953, the Court of Appeals denied petitioner's motion for leave to appeal to that court.

Thus the order of affirmance by the Appellate Division and denial of review by the Court of Appeals renders that Court the highest court in the state in which a decision in this proceeding can be held. *Niemotko v. Maryland*, 340 U. S. 268.

The Importance of this Case

This Court has never passed upon the serious question of free speech which is becoming recurrent (See *State of Ohio, ex rel. Greisinger v. Grand Rapids Board of Education*, October Term, 1949; *Halvajian v. Board of Education of City of Inglewood*, October Term, 1950; *Lyon v. Compton Union High School, etc.*, October Term, 1950, No. 627; *McKnight v. The Board of Education*, October Term, 1950, No. 649). Those cases involve the delicate question of the separation of church and state, since a religious group

sought the use of the public building for speaking. This case is free of the question of the use for a *religious* purpose.

The importance of this case is further emphasized by the fact, that the highest court of California in *Danskin v. San Diego Unified School District* (1946), 28 Cal. (2nd) 536, held squarely contrary to the decision in this case.

It is submitted that the time is ripe for a decision to lay at rest any doubts.

Opinion Below

The Appellate Division, which was the last court in which a decision was had (the Court of Appeals having refused leave to appeal to it) wrote a memorandum opinion. The opinion is contained in Appendix A to this Petition which is made a part hereof. The Supreme Court, Westchester County, wrote an opinion which is contained in the Record, folio 41.

Although the Supreme Court, Westchester County held that the appeal to the courts was not the proper remedy, nevertheless the Appellate Division held it to be the proper remedy.

Questions Presented

1. Does the construction and application of Section 414 of the Education Law of the State of New York and the "Rules and Regulations for Use of School Buildings and Grounds, Yonkers Board of Education" so as to prohibit assembly and public speaking by petitioner and his organization in the school buildings of Yonkers, New York, when not in use for school purposes, abridge petitioner's free-

doms of assembly and speech contrary to the First and Fourteenth Amendments to the Constitution of the United States?

2. Does the construction and application of Section 414 of the Education Law of the State of New York and the "Rules and Regulations for Use of School Buildings and Grounds, Yonkers Board of Education" so as to prevent assemblies by petitioner and his organization for public speaking on the subject of peace, while allowing meetings, forums and public discussions by other organizations as an accepted practice?

Statutes Involved

This case draws into question the validity of state legislation as construed, known as Section 414 Education Law of the State of New York. A copy of said statute is set forth as Appendix B to this statement.

The "Rules and Regulations for Use of School Buildings and Grounds, Yonkers Board of Education" are annexed hereto as Appendix C.

The statute was construed and applied by the Supreme Court, Westchester County to the admitted allegations of fact of the petition (since no answer was served) so as to mean that no subject of a "controversial" nature may be presented at a forum in public school property.

Although the Supreme Court, Westchester County had also ruled that the procedure in this instance should not have been by appeal to the courts, nevertheless, the Appellate Division held the contrary, and held that the remedy by appeal to the courts was proper.

As so construed and applied, the statute impaired petitioner's right of freedom of speech and assembly in that the word "controversial" is indefinite and uncertain and furthermore was discriminatory against petitioner's organization, since other organizations could use the property without hindrance in that respect.

Matters Related to Jurisdiction

Timeliness

The Court of Appeals of the State of New York, the highest court in the State, denied petitioner's motion for leave to appeal to it on October 22, 1953. The denial of such motion is not an affirmance of the decision below. *Matter of Marchant v. Mead-Morrison Manufacturing Co.*, 252 N. Y. 284.

The original application to the Supreme Court of the State of New York was denied by order dated January 22, 1953. An appeal was taken to the Appellate Division of the Supreme Court which affirmed the order by its order dated April 20, 1953. A motion for leave to appeal to the Court of Appeals was brought on May 8, 1953 (Section 592 subdivision 5(c), New York Civil Practice Act). That Court denied the motion by order dated May 18, 1953. Thereafter, by motion dated and served May 27, 1953, returnable the first available motion day, to wit: October 5, 1953, petitioner sought leave to appeal to the Court of Appeals (Section 592, subdivision 5(a) New York Civil Practice Act). The Court of Appeals denied such leave on October 22, 1953. Thus, the Supreme Court of the State of New York, Appellate Division thereof, is the last court in which a decision could be had. *Niemotko v. Maryland*,

340 U. S. 268. On that date petitioner exhausted his State remedies. The petitioner is therefore duly presented and filed within the time after the order became final.

Nature of Case

This is a proceeding in the nature of a mandamus proceeding brought by petitioner in the Supreme Court of the State of New York, County of Westchester, to compel the issuance of a permit to allow the petitioner's organization to use a public school in Yonkers, New York, for out of school purposes, under Section 414, Education Law of New York and the rules of the appellees promulgated pursuant thereto. (Article 78, New York Civil Practice Act.)

How Constitutional Questions Raised

In paragraphs 17 and 18 of the Petition it is alleged that the rights of petitioner and his organization under the Constitution of the United States have been denied (Record pp. 11, 12). These facts are adverted to in the opinion of the Supreme Court (Record p. 14).

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. 1257 (3).

Judgment Below Not Supported by Adequate Non-Federal Ground

At Special Term, in the Supreme Court, Westchester County, the Court in addition to holding that petitioner's forum was "controversial", that the petitioner's remedy

was by appeal to the Commissioner of Education and not to the courts. Upon review of that order, the Appellate Division held however, "The proceeding was properly before the court." Thus, the only possible non-federal question was decided in petitioner's favor. It thus became the law of the case. *Buffalo v. De Bon*, 232 A. D. 318.

The conclusion of the Appellate Division that the petitioner properly appealed to the courts was inescapable by reason of the decisions of the Supreme Court of the United States and of the highest courts of the State of New York.

The argument on this point is as follows:

When we consider that the rule is that once the Commissioner of Education has ruled there can be no appeal to the Courts (see *Levitch v. Board of Education*, 243 N. Y. 373; *Chapin v. Board of Education*, 291 N. Y. 241) how is a citizen to protect his constitutional rights? If he is debarred from pursuit of the protection of his constitutional rights in the Courts such procedure would be unconstitutional (Re *Oliver*, 333 U. S. 257; *Cole v. Arkansas*, 333 U. S. 196, 201); *United States v. Spector*, 343 U. S. 169, 172; 178-180; *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287; *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 228.

In Matter of *Sloat v. Board of Education*, 274 N. Y. 367, 370, 374 the right to appeal to the Courts was sustained for relief from the arbitrary acts of the Board of Education.

Lederman v. Board of Education, 301 N. Y. 476—where an attack was made on the constitutionality of Section 3022 Education Law. No review under Section 310 Education Law by the Commissioner was had or required.

Burstyn v. Wilson, 303 N. Y. 242, where an attack was made upon the reasonableness of the discretionary ruling barring a motion picture from exhibition. No review was required by the commissioner.

Lewis v. Board of Education, 258 N. Y 117, was an action to restrain the purchase and use of religious books in schools. No resort to the Commissioner was required as the exclusive remedy.

Specification of Errors to be Urged

1. The Court of last resort in which a decision could be had herein has in effect decided federal questions of substance not in accordance with applicable decisions of this Court, in that:

A. It held, contrary to *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642; *Terminiello v. Chicago*, 337 U. S. 1; *DeJonge v. Oregon*, 299 U. S. 353, 364, that the "controversial" nature of speech permits the public officer to bar such speech.

B. It held, contrary to *Marsh v. Alabama*, 326 U. S. 501, *Thornhill v. Alabama*, *Hague v. C. I. O.*, 307 U. S. 496, *Schneider v. State*, 308 U. S. 147, *Niemotko v. Maryland*, 340 U. S. 268, that the municipality may bar speech because of its ownership of a public building, even though it has dedicated and granted the use of the building to the public for public speech.

C. It held, contrary to *Niemotko v. Maryland*, 340 U. S. 268, that the denial of the use by petitioner for a public forum of the public building, although granted to others for public speaking, was not a denial of the equal protection of the laws.

Statement of the Case

The petition alleges that the unincorporated association herein composed of citizens of Yonkers and Westchester County sought to obtain the use of school facilities to hold a forum on the subject of peace. Application was made more than once and each time denied (ff. 22-30). Petitioner attempted to obtain the reason for refusal so that compliance with the requirements could be made. But the reason was refused (ff. 24, 30).

The City of Yonkers, pursuant to Section 414 of the Education Law has adopted regulations for the use of the school property during after-school hours by organizations such as petitioner (f. 30, see Appendix C). The petition alleges that the respondents, pursuant to such regulations, has permitted other organizations the use of such school property on so many numerous occasions (whose numbers are best known to respondents) that it has become an accepted practice (f. 32).

The respondents did not file an answer as required by Section 1291, Civil Practice Act, and therefore the allegations of the petition must be deemed admitted. (Section 1291).

The petitioner has fulfilled the requirements of the respondents, but the petitioner has not been apprised of any infirmity in their application or status. Therefore, the petitioner asserts the organization has been deprived of the equal protection of the laws in violation of the Constitution of the United States and has been deprived of the right of freedom of speech and assembly as guaranteed by the Constitution of the United States (ff. 33, 34).

The Questions Are Substantial

Introduction

The Bill of Rights, which is the quintessence of all the ethical teachings over the centuries, tells us that a person should have a right to talk on any subject he wishes, so long as the speaker does not incite to riot, incite to unlawful conduct or arouse to lust. Yet, it is interesting to note how plagued a person may be with prolonged litigation in order to obtain such a simple right. In this case, the Supreme Court, Westchester County, Special Term was moved by the fear that the subject matter might be "controversial" —as if controversy were some sort of taboo, and construed the statutes as forbidding the use of school property for "controversial" discussions.

On the Subject of Controversy

Since the Supreme Court, Westchester County, was influenced by what it thought to be the character of the forum, it may be profitable to examine the subject of "controversy". It is surprising that a Court should be afraid of a discussion that is "controversial". Lawyers and judges, of all people should know that controversy is the generating source of truth. The daily contentions of lawyers with propositions are indulged so that truth may be determined. Judges discuss and contend with each other in conference rooms so that truth may be ascertained. The conclusion that can be drawn is that controversy is a most desirable form of intellectual exercise, and should be encouraged. Why, therefore, this fear of this most efficient and healthy approach to truth?

Judge Brandeis put it down in memorable words:

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom." Whitney v. California, 274 U. S. 357, 375.

Assuming that a speaker's words were intended as the acts of a fifth columnist. Isn't it better that we know what the speaker stands for? That is what the Constitution intended. That is what Judge Brandeis meant. That is the American way. Open debate is not only a safety valve, in a cathartic sense, but is a guide to the safety of the Republic, because we learn, openly, the views of those who are for us, and those who are against us. The substitution of brawn for brain, or the suppression of speech leads to furtive activities.

Assuming that school facilities cannot be used for speech on a controversial subject, the test then is, *how do we know when it is controversial?* The Supreme Court, Westchester County, said the proposed subject, discussion of peace and war, were of a controversial nature. Where does one draw the line? If a discussion of peace can be controversial, then there seems to be nothing that can be without controversy. Even the discussion of formal and accepted truths of mathematics can be controversial. For instance, the axiom that

parallel lines never meet,—a fact we all accept, has been the subject of debate among non Euclidean mathematicians, who contend that they meet at infinity (Morris Cohen—"Reason and Nature", p. 173). What, therefore, can be left for a forum to discuss? The answer is that controversy exists in everything. It depends upon who the speaker is and who the listener is. If a listener accepts everything a speaker says, there can be no controversy.

Therefore, the criterion for determining the grant of the use of the premises upon the basis of lack of controversial subject matter has no basis in sound sense. Such basis would offend the Constitution of the United States. *West Virginia State Board of Education v. Barnette* 319 U. S. 624 at 642; *Terminiello v. Chicago*, 337 U. S. 1; *DeJonge v. Oregon*, 299 U. S. 353 at 364; *Feiner v. New York*, 340 U. S. 315, at 320 where it was said:

> "We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings."

Furthermore, Section 414, Education Law, does not bar the use of school property if the subject is controversial. The Supreme Court, Westchester County, derived its support from the opinions of the Attorney-General in certain communications. It is respectfully submitted that those opinions have no binding judicial validity. They are opinions submitted by the legal adviser of the State to various state agencies.

There Has Been Discrimination Against Petitioner

The respondents have been arbitrary in denying the use of the school not only because they refused to give a reason for the denial, not only because the subject of the forum may be or is "controversial," but because nothing in the law permits them to deny the use to the petitioner's organization where they have granted it to so many others. Paragraph "15" of the petition alleges that organizations similar to petitioner's have been granted permission to use the schoolhouses of Yonkers for public forums on innumerable occasions. The failure by respondents to deny paragraph "15" of the petition is an admission of the use to which the school properties have been put. Since no valid reason is given why the petitioner has been selected for denial, it is obviously a discrimination. It is thus an unconstitutional discrimination forbidden by the Federal Constitution. *Yick Wo v. Hopkins*, 118 U. S. 356 at 369; *Niemotko v. Maryland*, 340 U. S. 268.

The Grant of Use of Public Property is Subject to Constitutional Guarantees

To any contention that could be made that the State can withhold the use of its property and therefore does not have to permit its use by appellant or anyone, the answer is that once the grant is in existence then constitutional limitations and guarantees affect such use. For instance, in *Hague v. C. I. O.*, 307 U. S. 496, where streets are permitted to be used for public speaking; *Gaines v. Canada*, 305 U. S. 496, where streets are permitted to be used for public speaking; *Gaines v. Canada*, 305 U. S. 337, where schools established by the state were required to fulfill constitutional guarantees against discrimination; *Murdock v.*

Pennsylvania, 319 U. S. 105, where a tax on religious book vendors in the streets was held unconstitutional; *Schneider v. State*, 308 U. S. 147, where it was held that while a state may regulate the conduct of those who use streets for purposes other than movement on them, nevertheless, such regulations may not abridge constitutional guarantees; *Thornhill v. Alabama*, 310 U. S. 88, and *Niemotko v. Maryland*, 340 U. S. 268 to like effect.

Marsh v. Alabama, 326 U. S. 501 involved a conviction for distributing literature on privately owned property. The Court there observed (pp. 505-506): "We do not agree that the corporation's property interests settle the question * * * Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

In *Danskin v. San Diego Unified School District* (1946), 28 Cal. (2d) 536, the Supreme Court of California held unconstitutional, a requirement that the applicant swear that the group seeking the use of the school is not an organization advocating the overthrow of the government by force. It held that such requirement was a suppression of freedom of speech and assembly. It said, "the state is under no duty to make school buildings available for public meetings * * * If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings * * * Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights."

These citations stand for one common proposition, that is expressed or implicit—that once a public right is extend-

ed, which could otherwise be withheld, nevertheless, constitutional rights attend such grants. Therefore, petitioner has the constitutional right to insist that his organization be treated on equal terms with others and that his right of speech be not abridged.

The same citations stand for the proposition that the constitutional rights of the petitioner have been impaired in so far as the action of the respondents has resulted in denying the petitioner the rights of freedom of speech and assembly. The respondents by their actions have censored petitioner in advance, and have deprived it the opportunities of speech, which it provided to others.

What has been countenanced by the State courts in this case is precensorship of petitioner's speech.

Conclusion

The petition should be granted and the judgment should be reversed.

Respectfully submitted,

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APPENDIX A

Opinion of Appellate Division

New York Law Journal 4/21/53, p. 1320.

Matter of *Ellis, ap* (*Dixon, Jr., res*)—In a proceeding under article 78 of the Civil Practice Act to compel respondents to grant permission for the use of a school building by an unincorporated association of which petitioner is president, petitioner appeals from an order which denied his application and which granted respondents' cross-motion to dismiss the petition. Order unanimously affirmed, with $10 costs and disbursements. The proceeding was properly before the court. However, the petition does not allege facts which establish a clear legal right to the relief sought nor which establish that respondents failed to perform a duty enjoined by law.

APPENDIX B

§ 414. Use of Schoolhouse and Grounds Out of School Hours

Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, when not as are herein provided. Such regulations shall not conin use for school purposes, for such other public purposes flict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district when not in use for school purposes, for any of the following purposes:

1. For the purpose of instruction in any branch of education, learning or the arts.

2. For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

3. For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be nonexclusive and shall be open to the general public.

4. For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of United States and organizations of volunteer firemen.

5. For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no political meetings shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

6. For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic

forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be nonexclusive and open to the general public.

APPENDIX C

Rules and Regulations for Use of School Buildings and Grounds

YONKERS BOARD OF EDUCATION
YONKERS, N. Y.

1. All applications for the use of public school buildings and grounds shall be made in writing upon the forms of the Board of Education and submitted to the Secretary of the Board of Education at least fifteen days in advance of the date requested. No reservation shall be valid until said application has been filed and approved in accordance with the provisions of these rules.

2. The use of school buildings and grounds after school hours shall be governed by Section 414 of the State Education Law and Section 4 of Article XI of the New York State Constitution.

3. All affairs in the public schools must be non-exclusive and open to the public without charge, except when the proceeds of such affair are to be devoted to the purposes set forth in Section 414 of the State Education Law.

4. When admission is charged the applicant shall be responsible for the payment of any and all State and Federal taxes.

5. Whenever school buildings or grounds are desired for school activities after 5:00 P. M. on school days or on Saturdays the same application shall be required.

6. School activities shall take precedence over any non-school activity.

7. All fees charged for the use of school buildings or grounds must be paid at least five days in advance of the date reserved, and no permits shall be postponed or cancelled by the applicant unless the request for such postponement or cancellation shall have been received and approved at least five days prior to the date stipulated in the permit.

8. All non-school organizations desiring to use school property shall be required to file with the Secretary of the Board of Education an approved form attesting that they are not subversive and fully conform to all provisions of statute and regulations as established by the State of New York and/or the Board of Education of the City of Yonkers, New York.

9. The custodian shall be the representative of the Board of Education and shall be responsible for the enforcement of the rules and regulations of the Board. The term "Custodian" as used herein, is intended to mean the head custodian of a building, or any member of his staff who is in charge of the building at the time of its use by any organization.

10. The permit shall include the services of the custodian and his assistants in the performance of their regular duties. These duties do not include the setting or aiding in setting up of scenery or special stage equipment, moving furniture or other heavy equipment. He may, however, be required to place chairs or tables where needed.

11. The showing of motion pictures in the public schools shall be subject to the following regulations:

a. Incandescent lamps exceeding 1000 watts may not be used.

b. Only safety film may be used. The use of 35 m.m. nitrous oxide film is forbidden. Any variation from

this regulation must be approved by formal resolution of the Board of Education and written consent of the Chief of the Yonkers Fire Department.

c. All electrical installations must be in conformity with local and state fire and safety laws.

12. No cash prizes, drawing for cash, or playing of games for cash shall be permitted.

13. A building-use permit does not allow the subletting of any portion of the building.

14. Both the individual signing the application and the organization which he represents shall be held responsible for any breakage or damage to supplies, equipment, buildings or grounds.

15. Smoking, the use of intoxicants or profane or indecent language or conduct shall positively be prohibited in any and all parts of the school building.

16. The use of any building when not in use for school purposes and up to 5 P. M. on school days may be obtained upon approval of the principal of the school. No other approval is necessary except where admission is to be charged, in which event the Secretary of the Board of Education shall be notified in advance as to the amount of said admission charge, in order that the Collector of Internal Revenue may be notified. The principal shall refer any questionable application to the Permit Committee, consisting of the Superintendent of Schools, the Deputy Superintendent of Schools, the Secretary of the Board of Education, for appropriate action.

17. The multiple use of school buildings shall be encouraged in order to effect more economical operation of the physical plant.

18. No school building may be used after 12:00 o'clock midnight.

19. Special permission from the Board of Education must be obtained for Sunday use of school property.

20. Athletic fields, for other than school activities, may be used only by special permission of the Board of Education.

21. There shall be no reduction of fees for summer use of school property.

22. The rental permit shall state the exact portion of building to be used and organizations shall be required to conform.

23. No member of the custodial staff may be required to work more than two nights per week for activities other than those which are associated with his regular duties.

24. The Secretary of the Board of Education shall refer any questionable applications to the Permit Committee as outlined under rule No. 16.

25. The Board of Education expressly reserves the right to refuse, deny, or revoke the right to use public school property, whenever, or wherever such action or refusal is deemed by the Board of Education, in its sole judgment, to be in the best interests of the public schools.

26. All service and custodial fees collected under these regulations shall be credited to a revolving fund in a manner prescribed by and acceptable to the proper administrative officers of the City of Yonkers and the Board of Education of Yonkers, N. Y. Proceeds of such fund shall be used to pay custodial services and pay the cost of heat, light, fuel and custodial maintenance supplies.

27. The fees for the use of school buildings and property shall be as follows:

BUILDING USE FEES

Service Charges—after 5 P. M.

	Auditorium	*Gymnasium*	*First Classroom*	*Additional Classroom*	*Cafeteria*	*Kitchen*
Roosevelt High School Gorton High School Yonkers High School Commerce High School Saunders Trades School Hawthorne Jr. High School	$50.00	$20.00	$5.00	$2.50	$25.00	$2.00
Schools #1 and #26	10.00	10.00	5.00	2.50	25.00	2.00
All other schools	25.00	10.00	5.00	2.50	25.00	2.00

Service charges for rehearsals—one half the regular charge

Classrooms used in conjunction with auditorium, gymnasium or cafeteria facilities shall be at the rate for additional classrooms.

Custodial Fees (per employee, regardless of multiple use of buildings)

$5.00 for the first three hours up to 11 P. M.—Monday through Friday.

Overtime at the rate of $.75 each additional half hour up to 11 p. m. and $1.50 each half hour or fraction thereof after 11 P. M.

$3.00 per hour per man for Saturday, Sunday and Legal Holidays.

The Recreation Commission, Boy Scouts, Girl Scouts and approved Civil Defense organizations shall not be charged a service fee for the use of any portion of a building except when admission is charged. When admission is charged the regular service fees shall be charged.

Organizations of the Yonkers Public Schools, Parent-Teachers Associations, Neighborhood Councils or Senior Councils of the Yonkers Public Schools shall not be charged a service fee at any time for any use of public school buildings.

Any Yonkers community organization whose objectives are educational, cultural, and non-profit making within the meaning of the Education Law may be granted exemption from, or reduction of, service fees, if upon special application, considered at a regular Board meeting, such reduction or waiver of fees is deemed by the Board of Education in its sole judgment, to be in the community interest.

SPECIAL REGULATIONS

Auditoriums:

Pi[illegible]o and normal stage equipment may be used by arrangement with the school custodian.

Where special piano tuning is required arrangements shall be made with the Director of Music.

Special equipment such as scenery, projectors or public address system may not be used without special arrangement.

Special lighting equipment may be used when it is a permanent installation of the auditorium.

Special or additional lighting equipment may be used only under the supervision of a licensed electrician and all temporary wiring or changes in wiring must be approved by the Supervisor of Buildings of the Board of Education before operation will be permitted.

Gymnasium:

Rental of gymnasiums shall include the use of locker and shower rooms where available.

Special equipment or apparatus may not be used without special arrangement.

Cafeterias: (for use by outside groups for dinners, etc.)

School Cafeteria personnel shall be utilized as required at stated rates, arrangements for which must be made through the Director of School Lunch Programs.

Rental does not include use of the kitchen and cooking equipment without special permission obtained beforehand.

Kitchen Privileges:

This applies only to those schools having all purpose rooms.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
AUG 23 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,
Petitioner,

—against—

WILLIAM DIXON, *et al.*, as members of the Board of Education of the City of Yonkers, etc.,
Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

—against—

WILLIAM DIXON, *et al.*, as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

BRIEF OF PETITIONER

Opinions Below

The Appellate Division which was the last court in which a decision was had (the Court of Appeals having refused leave to appeal to it) wrote a memorandum opinion. The opinion is reported in 281 App. Div. 987, Case No. 4. The text is set forth in this brief in Appendix A. The Supreme Court, Westchester County, wrote an opinion which is contained in the Record, page 14.

It should be noted in connection with the opinions that although the Supreme Court, Westchester County, had held that the appeal to the courts was not the proper remedy, nevertheless the Appellate Division held it to be the proper remedy. But the Appellate Division affirmed on a different ground, to wit: that petitioner failed to show a legal right to relief.

Matters Related to Jurisdiction

(a) Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. 1257 (3).

(b) Timeliness

The Court of Appeals of the State of New York, the highest court in the State, denied petitioner's motion for leave to appeal to it on October 22, 1953, 306 N. Y. page i, Advance Sheets November 14, 1953, No. 759. The denial of such motion is not an affirmance of the decision below. *Matter of Marchant* v. *Mead-Morrison Manufacturing Co.,* 252 N. Y. 284.

The original application to the Supreme Court of the State of New York was denied by order dated January 22, 1953. An appeal was taken to the Appellate Division of the Supreme Court which affirmed the order by its order dated April 20, 1953. A motion for leave to appeal to the Court of Appeals was brought on May 8, 1953. (Section 592, subdivision 5 (c), New York Civil Practice Act.) That Court denied the motion by order dated May 18, 1953 (281 App. Div. 1037). Thereafter, by motion dated and

served May 27, 1953, returnable the first available motion day, to wit: October 5, 1953, petitioner sought leave to appeal to the Court of Appeals (Section 592, subdivision 5 (a) New York Civil Practice Act). The Court of Appeals denied such leave on October 22, 1953. Thus, the Supreme Court of the State of New York, Appellate Division thereof, is the last court in which a decision could be had. *Niemotko* v. *Maryland*, 340 U. S. 268.

(c) Judgment Below Not Supported by Adequate Non-Federal Ground

At Special Term, in the Supreme Court, Westchester County, the Court in addition to holding that petitioner's subject of speech was "controversial", held that the petitioner's remedy was by way of appeal to the Commissioner of Education and not to the courts. Upon review of that order, the Appellate Division held however, "The proceeding was properly before the court." Thus, the only non-federal question was decided in petitioner's favor. It thus became the law of the case. *Buffalo* v. *De Bon*, 232 App. Div. 318.

The conclusion of the Appellate Division that the petitioner properly appealed to the courts was inescapable by reason of the decisions of the Supreme Court of the United States and of the highest courts of the State of New York.

The argument on this point ran as follows:

When we consider that the rule is that once the Commissioner of Education has ruled there can be no appeal to the Courts (see *Levitch* v. *Board of Edu-*

cation, 243 N. Y. 373; *Chapin* v. *Board of Education*, 291 N. Y. 241) how is a citizen to protect his constitutional rights? If he is debarred from pursuit of the protection of his constitutional rights in the Courts such procedure would be unconstitutional (*Re Oliver*, 233 U. S. 257; *Cole* v. *Arkansas*, 333 U. S. 196, 201); *United States* v. *Spector*, 343 U. S. 169, 172, 178-180; *Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 228.

In *Matter of Sloat* v. *Board of Education*, 274 N. Y. 367, 370, 374 the right to appeal to the Courts was sustained for relief from the arbitrary acts of the Board of Education.

Lederman v. *Board of Education*, 301 N. Y. 476—where an attack was made on the constitutionality of Section 3022 Education Law. No review under Section 310 Education Law by the Commissioner was had or required.

Burstyn v. *Wilson*, 303 N. Y. 242, where an attack was made upon the reasonableness of the discretionary ruling barring a motion picture from exhibition. No review was required by the Commissioner.

Lewis v. *Board of Education*, 258 N. Y. 117, was an action to restrain the purchase and use of religious books in schools. No resort to the Commissioner was required as the exclusive remedy.

(d) How Constitutional Questions Raised

In Record, folios 33, 34, it is alleged in Petitioner's petition to Supreme Court, Westchester County, that the rights of petitioner and his organization under the

Constitution of the United States have been denied. These facts are adverted to in the opinion of the Supreme Court (R., fol. 42).

(e) Federal Questions Were Necessarily Passed Upon

The Appellate Division, the highest court in which a decision could be had, necessarily passed upon the Federal Constitution question raised. In the Supreme Court, Westchester County, petitioner alleged (R., fols. 33, 34) that he was denied the right to use the public place for public speaking and assembly and that such denial constituted a discrimination against him in that others were permitted to speak, and he further alleged (R., fol. 34) that the action of the respondents violated his right of freedom of speech and assembly as guaranteed by the Constitution of the United States and denied him the equal protection of the laws. In the Supreme Court, it was held (R., fol. 42) that these constitutional questions were raised, but because the right to grant the use of public property was discretionary with the respondents, the petitioner had no legal basis to assert that his constitutional rights were impaired (R., fols. 45-57). In this connection, the court also stated, that since the object of petitioner's organization and the proposed subject of speech were controversial, then the discretion was not arbitrarily exercised (R., fol. 49).

The Appellate Division agreed with this holding in its opinion that the petitioner does not show a clear legal right to relief.

It thus follows that both courts below negated petitioner's claim that he had a constitutional right to public assembly and speech on public property with-

out censorship against his subject matter or without discrimination against his organization exercised under the guise of discretion. It was and is petitioner's claim under the Federal Constitution, that the local authorities had no discretion to withhold the use of public property for public speech and assembly when they had dedicated, or at least, made accessible such public property for such uses; and if they granted such uses to other persons and organizations, they could not discriminate as a matter of law against the petitioner or against the subject matter of his proposed speech. The rulings in the State courts have inescapably passed upon the Federal questions thus raised by denying that petitioner had such legal right.

Statutes Involved

This case draws into question the validity of state legislation as construed, known as Section 414 Education Law of the State of New York and the "Rules and Regulations for Use of School Buildings and Grounds, Yonkers Board of Education". A copy of said statute is set forth as Appendix B to this statement.

The "Rules and Regulations for Use of School Buildings and Grounds, Yonkers Board of Education" are annexed hereto as Appendix C.

The statute and rules were construed and applied by the Supreme Court, Westchester County to the admitted allegations of fact of the petition (since no answer was served) so as to mean that no subject of a "controversial" nature may be presented at a forum in public school property.

Although the Supreme Court, Westchester County had also ruled that the procedure in this instance should not have been by appeal to the courts, nevertheless, the Appellate Division held the contrary, and held that the remedy by appeal to the courts was proper.

As so construed and applied, the statute and rules impaired petitioner's right of freedom of speech and assembly in that the word "controversial" is indefinite and uncertain and furthermore was discriminatory against petitioner's organization, since other organizations could use the property without hindrance in that respect.

The Importance of This Case

This Court has never passed upon this serious question of free speech which is becoming recurrent (see *State of Ohio, ex rel. Greisinger* v. *Grand Rapids Board of Education*, October Term, 1949; *Halvajian* v. *Board of Education of City of Inglewood*, October Term, 1950; *Lyon* v. *Compton Union High School, etc.*, October Term, 1950, No. 627; *McKnight* v. *The Board of Education*, October Term, 1950, No. 649). Those cases involve the delicate question of the separation of church and state, since a religious group sought the use of the public building for speaking. This case is free of the question of the use for a religious purpose.

The importance of this case is further emphasized by the fact, that the highest court of California in *Danskin* v. *San Diego Unified School District* (1946), 28 Cal. (2nd) 536, held squarely contrary to the decision in this case.

Questions Presented

1. Does the construction and application of Section 414 of the Education Law of the State of New York and the "Rules and Regulations for Use of School Buildings and Grounds, Yonkers Board of Education" so as to prohibit assembly and public speaking by petitioner and his organization in the school buildings of Yonkers, New York, when not in use for school purposes, abridge petitioner's freedoms of assembly and speech contrary to the First and Fourteenth Amendments to the Constitution of the United States?

2. Does the construction and application of Section 414 of the Education Law of the State of New York and the "Rules and Regulations for Use of School Buildings and Grounds, Yonkers Board of Education" so as to prevent assemblies by Petitioner and his organization for public speaking on the subject of peace, while allowing meetings, forums and public discussions by other organizations as an accepted practice?

Errors Urged

1. The Court of last resort in which a decision could be had herein has in effect decided federal questions of substance not in accordance with applicable decisions of this Court, in that:

A. It held that the municipality had unlimited discretion, without standards, to permit or bar a speaker, though it had granted and made accessible the use of school buildings to the public for public speech.

B. It held that the "controversial" nature of speech permits the public officer to bar such speech.

C. It held that the denial of the use by petitioner for a public forum of the public building, although granted to others for public speaking, was not a denial of the equal protection of the laws.

Statement of the Case

The petition alleges that it is an unincorporated association composed of citizens of Yonkers and Westchester County and sought to obtain the use of school facilities to hold a forum on the subject of peace. Application was made more than once and each time denied (R., fols. 22-30). Petitioner attempted to obtain the reason for refusal so that compliance with the requirements could be made. But the reason was refused (R., fols. 24, 30).

The City of Yonkers, pursuant to Section 414 of the Education Law adopted regulations for the use of the school property during after-school hours by organizations such as petitioner (R., fol. 30, see Appendix C). The petition alleges that the respondents, pursuant to such regulations, has permitted other organizations the use of such school property on so many numerous occasions (whose numbers are best known to respondents) that it has become an accepted practice (R., fol. 32).

The respondents did not file an answer as required by Section 1291, Civil Practice Act of New York, and therefore the allegations of the petition must be deemed admitted (Section 1291).

Therefore, the petitioner asserts the organization has been deprived of the equal protection of the laws in violation of the Constitution of the United States and has been deprived of the right of freedom of speech and assembly as guaranteed by the Constitution of the United States (R., fols. 33, 34).

Concerning Petitioner's Organization

Respondents in their brief in opposition to the petition for the writ of certiorari stated (p. 6):

> "Unquestionably the respondents had knowledge of the fact that a forum held by the Yonkers Committee for Peace at the Young Women's Christian Association in the City of Yonkers on November 19th, 1951, created considerable dissatisfaction and criticism among some of the citizens and veterans organizations of the City, the forum having been publicized in many issues of the local newspaper before and after it was held and took this into consideration when they refused to grant permission to petitioner's organization for the use of school property to hold a forum for a discussion on war and peace. The objects and purposes of petitioner's organization, as set forth in the petition (R., fols. 16-20) and the proposed subject of the forum discussions are, as pointed out in the opinion of the New York Supreme Court, Westchester County (R., fols. 41-55), of an essentially controversial nature."

This not only reveals the motives for the denial of the permit which had previously been marked by si-

lence (R., fol. 32), but it introduces facts, not appearing in the record that should be contradicted here.

The meeting referred to by respondents was held on November 19, 1951 at the Young Women's Christian Association in Yonkers. The meeting was addressed on the subject of peace by Stephen G. Gary, a well-known Quaker. The meeting was also addressed and chaired by Dr. G. James Fleming.

A vigilante-minded group tried to prevent the meeting from taking place, but the Young Women's Christian Association in Yonkers stood fast, to its great credit and permitted the forum to be held.

At sermons, the pastor of the First Presbyterian Church North Broadway of Yonkers and the pastor of the Church of the Redeemer of Yonkers characterized the action of the Young Women's Christian Association of Yonkers as mature thinking and a courageous stand against the assumption of vigilante powers. The meeting was held without any physical disturbance or inconvenience to the public.

The Aims and Purposes of Petitioner's Organization (R., fols. 16-21)

Petitioner's association was formed among residents and citizens of the City of Yonkers and of Westchester County for the object of arranging forums for the discussion of problems relating to peace against war. The objects of this group can best be stated from the statement of purposes of the organization which was drafted at the time it was organized:

"We have a choice between life in peace, or

death by war. There is no third choice. In the event of an atomic war, the front line will not be thousands of miles away but right at our front doors. You may be a victim.

We realize that there are differing views on the causes and solutions of the world's troubles, but we firmly believe that war is not the cure for any of them. Winter, Spring, Summer and Fall are inevitable. We believe that war is not. War is man-made and can be undone by man.

This is our aim; this is our cause * * * STOP WAR. Here is how we think it can be done.

1. As Americans we have the privilege of letting our representatives in Washington know how we feel about any matter. The price of a postcard is the cost to you. It's a very good investment.

2. We also have the right to let the press and radio know of our feelings toward any of their propaganda drives. Right now they are drumming for war. Let them know how you feel about it.

3. It is our privilege and our duty to hear both sides of every issue before making a decision. Your daily press is one side of this war issue. Any of numerous peace groups in every section of our land can give you the other side.

4. Taxes are collected by the government to improve the welfare of the American people. For our tax money we can have armed camps throughout the entire world, or better schools, better homes and lower living costs. Which do you want? Let your Congressman know, your friends

and everyone you come in contact with. This is our birthright, and to fear open discussion is more un-American than any difference of opinion amongst us could possibly be.

This country of the people, by the people, and for the people shall indeed remain free if we all exercise our rights as citizens."

Summary of Argument

(1) Public property when made accessible for public speech and assembly becomes subject to constitutional guarantees and protection.

(2) Such guarantees of free speech and assembly preclude the denial of the right to speak or assemble by a board or licensor who acts without any standards.

(3) There is no standard in the text of the statute for a denial of a permit on the ground that the subject matter is "controversial".

(4) The statute as construed by the Court to bar "controversial" subjects is a denial of due process in that (a) it is vague, indefinite and uncertain, and (b) it is censorship in advance.

(5) There has been discrimination against the petitioner in denying him a public forum when such forums were accessible to others.

(6) The Courts below were therefore in error in holding that the petitioner has not shown a right to relief.

(7) Conclusion.

POINT I

Public property when made accessible for public speech and assembly becomes subject to constitutional guarantees and protection.

The State need not make public property, like schools, available for use by the public for assembly and speech, but if it makes them available constitutional protections attach.

In *Lovell* v. *Griffin,* 303 U. S. 444, this court held that a municipality cannot bar completely the dissemination of political ideas on sidewalks and public places, nor make that right dependent on a permit to be issued by an official who can grant or deny it as his discretion without any standards for control.

In *Jamison* v. *Texas,* 318 U. S. 413, it was held that an ordinance cannot completely prohibit dissemination of ideas on streets because the municipality owns the title to the streets.

See also to the same effect:

Hague v. *C. I. O.,* 307 U. S. 496, where the broad rule was enunciated, protecting speech and assembly in the streets.

Gaines v. *Canada,* 305 U. S. 337, holding that schools established by the state were required to fulfill constitutional guarantees against discrimination (now fortified by the historical decision in *Brown* v. *Board of Education of Topeka, etc.,* 98 L. Ed., p. 583).

Murdock v. *Pennsylvania*, 319 U. S. 105, where as tax on religious books vendors was held void.

Schneider v. *State*, 308 U. S. 147, deciding that although the state may regulate the conduct of those who use streets for purposes other than movement on them, nevertheless, such regulations may not abridge constitutional guarantees.

In *Danskin* v. *San Diego Unified School, Dist.* (S. Ct. 1946), 28 Calif. (2nd Series) 536, 171 Pacific (2) 885, a mandamous proceeding was brought to compel school board to grant permission to petitioners to use school auditorium without conditions.

Petitioners applied for permission to use the school auditorium on the general theme "Bill of Rights in Postwar America". The Board granted permission on condition that the applicants subscribe an oath that the applicant is not affiliated with any organization that advocates the overthrow of the present Government of the United States by force. Petitioners refused to comply, on the ground that it violated the Constitution of the United States.

In California it is provided that school auditoriums may be used for the discussion of any subject of educational, political or economic interest. The statutes also provide that such use cannot be made by any individual or organization whose object is that of overthrowing or advocating the overthrowing the Government of the United States by force. The governing board is prohibited from granting the use of auditorium to such persons or organizations.

It was held nevertheless that freedom of speech cannot be impaired unless a clear and present danger

exists and that to condition a permit on the connections or affiliations of a person is a violation of the protections of speech.

"The state is under no duty to make school buildings available for public meetings. If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. *State of Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, see *Marsh* v. *Alabama*, 66 S. Ct. 276. Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property. *Frost* v. *Railroad Commission of California*, 271 U. S. 583, 594; *Hague* v. *C. I. O.*, 307 U. S. 496, 515; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 110, 111." . . .

"The convictions or affiliations of one who requests the use of a school building as a forum is of no more concern to the school administrators than to a superintendent of parks or streets if the forum is the green or market place" . . .

"The very purpose of a forum is the interchange of ideas, and that purpose cannot be frustrated by a censorship that would label certain convictions and affiliations, suspect, denying the privilege of assembly to those who held them, but granting them to those whose convictions and affiliations happened to be acceptable and in effect amplifying their privilege by making it a special one."

"The privilege of using a school building as a public forum is one too valuable to be given lightly or

lightly taken away. It is also too valuable lightly to be received. It can be lost to the whole community if some persons or groups abuse it frivolously, maliciously or dangerously. The state must be on the alert for any clear and present danger to the community, sensative to the warning signals, the ambiance in which a forum is planned, the atmosphere that envelops it. It cannot look with equanimity upon those whose words or actions have already left in their wake a trail of violence."

"Always it must distinguish, however, between speech, no matter how unorthodox, that remains on a theoretical plane, and speech, no matter how skillfully intoned, that creates a clear and present danger to the community. 'There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason. *Cf. Bridges* v. *California* (1941), 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (159 A. L. R. 1346), and Justice Brandeis' concurring opinion *Whitney* v. *California,* 274 U. S. 357, 372-380, 47 S. Ct. 641, 647-650, 71 L. Ed. 1095.' See also, *Taylor* v. *Mississippi* (1942), 319 U. S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600; *Schneiderman* v. *United States,* 320 U. S. 118, 157, 63 S. Ct. 1333, 87 L. Ed. 1796."

Justice Carter who concurred stated the following

which seems more pointed toward a determination of the issues of this case:

> "As I see the question presented here, it is whether or not the Legislature may authorize the use of school property as a civic center and at the same time place it within the power of the governing school board to deny permission for the use of said property to persons who may be affiliated with organizations which the Legislature has declared to constitute a subversive element. The effect of such legislation is to permit a prior censorship on the right of assembly and expression. In my opinion this cannot be done without violating the provisions of the First and Fourteenth Amendments to the Constitution of the United States. The First Amendment unqualifiedly guarantees freedom of speech and freedom of assembly. No restriction on the exercise of these rights is mentioned in the Constitution or the amendments thereto. The restrictions which have been placed upon these rights are found in the judicial decisions interpreting the provisions above mentioned. In *Schenck* v. *United States*, 249 U. S. 47, at page 52, 39 S. Ct. 247, at page 249, 63 L. Ed. 470, Mr. Justice Holmes said: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 439, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A., N. S. 874. The question in every case is whether the words are used in such circumstances and are of such a nature as to create

a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree.' The clear and present danger rule has been followed and applied by the Supreme Court of the United States in numerous decisions in the interpretation of statutes designed to proscribe the rights of freedom of speech and of assembly under varying circumstances and conditions. The trend of these decisions as disclosed by the citations thereof in the opinion prepared by Mr. Justice TRAYNOR in this case is toward a more liberal application of the provisions of the First and Fourteenth Amendments of the Constitution of the United States to the end that freedom of speech and of assembly may not be denied to persons because of their affiliation with organizations declared by a state to constitute a subversive element. This thought was clearly expressed by Chief Justice Hughes in *DeJonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 255, 260, 81 L. Ed. 278, where he said: 'We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding these objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that party.'

I can see no escape from the proposition that if membership in or affiliation with the organization declared to constitute a subversive element does not deprive one of his right to freedom of speech or of assembly, it is then beyond the power of the Legislature to authorize restrictions against the use of school property which will prevent such

persons from using such property in the same manner as other members of the public may be permitted to use the same in the exercise of their rights of speech and assembly."

Such Constitutional Protections Extend to Even Private Property

To emphasize and illustrate the point just made, reference is made to those cases where it was held that even where speech and assembly was made accessible on private property, then constitutional guarantees applied.

In *Thornhill* v. *Alabama,* 310 U. S. 88, where picketing took place on private property this Court held that the right of freedom of speech was not only guaranteed on public property, but also on private. Said this Court:

"It is not enough to say that § 3448 is limited or restricted in its application to such activity as takes place on the scene of the labor dispute. '(The) streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' *Schneider* v. *State,* 308 U. S. 147, 161, 163; *Hague* v. *C. I. O.,* 307 U. S. 496, 515-16. The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by § 3448."

Marsh v. *Alabama*, 326 U. S. 501, involved a conviction for distributing literature on privately owned property. The Court there observed (pp. 505-506):

> "We do not agree that the corporation's property interests settle the question. * * * Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

See also: 5 A. L. R. 886, 7 A. L. R. 791, 52 A. L. R. 249, 86 A. L. R. 1181, 161 A. L. R. 1308.

The City of Yonkers has made schools available for public speech in accordance with the authority of the statute (R., fol. 30; Appendices B and C, hereto). It therefore follows that the action of the City of Yonkers, acting through the respondents was circumscribed by constitutional inhibitions.

POINT II

Speech in public places cannot be subjected to the discretion of a licensor who acts without standards.

The general statement on the subject is found in *Thornhill* v. *Alabama, supra,* where this Court stated:

> "The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure

comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

In *Niemotko* v. *Maryland*, 340 U. S. 268, it was held that speech in public places cannot be denied by a licensor acting without standards.

In *Kunz* v. *New York*, 340 U. S. 290, decided the same day, this Court held that a license cannot be refused for speech on the street when the discretion of the administrative official is not defined. This Court there said:

"In considering the right of a municipality to control the use of public streets for the expression of religious views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' *Hague* v. *C. I. O.*, 307 U. S. 496, 515, 83 L. ed. 1423, 1436, 59 S. Ct. 594 (1939). Although this Court has recognized that a statute may be enacted which prevents serious inference with normal usage of streets and parks, *Cox* v. *New Hampshire*, 312 U. S. 569, 85 L. ed. 1049, 61 S. Ct. 762, 133 A. L. R. 1396 (1941), we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unre-

lated to proper regulation of public places. In *Cantwell* v. *Connecticut*, 310 U. S. 296, 84 L. ed. 1213, 60 S. Ct. 900, 128 A. L. R. 1352 (1940), this Court held invalid an ordinance which required a license for soliciting money for religious causes. Speaking for a unanimous Court, Mr. Justice Roberts said: 'But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.' 310 U. S. at 307. To the same effect are *Lovell* v. *Griffin*, 303 U. S. 444, 82 L. ed. 949, 58 S. Ct. 666 (1938); *Hague* v. *C. I. O.*, 307 U. S. 496, 83 L. ed. 1423, 59 S. Ct. 954 (1939); *Largent* v. *Texas*, 318 U. S. 418, 87 L. ed. 873, 63 S. Ct. 667 (1943). In *Saia* v. *New York*, 334 U. S. 558 (1948), we reaffirmed the invalidity of such prior restraints upon the right to speak: 'We hold that § 3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loudspeaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion."

POINT III

The statute does not provide a standard for issuance or refusal of a permit.

By Section 414 Education Law of the State of New York (Appendix B hereto) it is provided that the boards of education may adopt regulations for use of school buildings for various uses, when not in use for strictly school purposes. It lists several uses. Among them are the following which are pertinent to the issues of this case:

"1. For the purpose of instruction in any branch of education, learning or the arts.

* * * *

3. For holding social, civic and recreational meetings and entertainments and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be nonexclusive and shall be open to the general public."

* * * *

The statute does not discriminate among persons or organizations, as did the California statute in the *Danskin* case *supra.*

The statute does not provide any standards by which a board may determine which persons may use the facilities for the purposes just enumerated.

Indeed, to fill this need the Yonkers Board of Education in its Rules (Appendix C hereto) subdivision 25 arrogated to itself unlimited power and discretion to decide upon its use. That subdivision states:

"25. The Board of Education expressly re-

> serves the right to refuse, deny or revoke the right to use public school property, whenever, or wherever such action or refusal is deemed by the Board of Education, in its sole judgment, to be in the best interests of the public schools."

Thus the respondents have stated that it may refuse the use at any time it decided or pleased.

This, it is evident, is discretion run riot. It is not a discretion fettered with rules of law. It is a proclamation that the board can act at its whim or as arbitrarily as it deemed fit.

The respondent's brief in opposition to the petition for a writ does not set forth any standards that define or localize the action of the respondents. In fact, it confesses such lack of standards. It argues that these respondents have sole discretion in the matter, and therefore, the petitioner has no rights about which he may complain.

The only assertion by respondents that touches on standards is the plea that the statute should be construed to bar controversial issues.

The Court at Special Term similarly did not state any standards that control, other than his construction that the board had absolute discretion (R., fol. 44). He cited the statute for support. But the statute does not so state. It states on the contrary, that the board may make regulations, but such regulations shall not be inconsistent with the statute.

The conclusion is therefore inescapable that the text of Section 414 does not fix any standards. Nor does it provide that controversial persons and subjects may be excluded, as Special Term ruled (R., fol. 45).

POINT IV

The denial of the use of the public property for speech because the subject matter may be "controversial" is a denial of due process of law.

Introduction

The Bill of Rights, which is the quintessence of all the ethical teachings over the centuries, tells us that a person should have a right to talk on any subject he wishes, so long as the speaker does not incite to riot, incite to unlawful conduct or arouse to lust. Yet, it is interesting to note how plagued a person may be with prolonged litigation in order to obtain such a simple right. In this case, the Supreme Court, Westchester County, Special Term was moved by the fear that the subject matter might be "controversial" —as if controversy were some sort of taboo, and construed the statutes as forbidding the use of school property for "controversial discussions".

On the Subject of Controversy

Since the Supreme Court, Westchester County, was influenced by what it thought to be the character of the forum, it may be profitable to examine the subject of "controversy". It is surprising that a Court should be afraid of a discussion that is "controversial". Lawyers and judges, of all people should know that controversy is the generating source of truth. The daily contentions of lawyers with propositions are indulged so that truth may be determined. Judges

discuss and contend with each other in conference rooms so that truth might be ascertained. The conclusion that can be drawn is that controversy is a most desirable form of intellectual exercise, and should be encouraged. Why, therefore, this fear of this most efficient and healthy approach to truth?

Judge Brandeis put it down in memorable words:

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may be fall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. *Whitney* v. *California*, 274 U. S. 357, 375."

Assuming that a speaker's words were intended as the acts of a fifth columnist. Isn't it better that we know what the speaker stands for? That is what the Constitution intended. That is what Judge Brandeis meant. That is the American way. Open debate is not only a safety valve, in a cathartic sense, but is a guide to the safety of the Republic, because we learn, openly, the views of those who are for us, and those

who are against us. The substitution of brawn for brain, or the suppression of speech leads to furtive activities.

Assuming that school facilities cannot be used for speech on a "controversial" subject, the test then is, how do we know when it is "controversial"? The Supreme Court, Westchester County, said the proposed subject, discussion of peace and war, were of a controversial nature. Where does one draw the line? If a discussion of peace can be controversial, then there seems to be nothing that can be without controversy. Even the discussion of formal and accepted truths of mathematics can be controversial. For instance, the axiom that parallel lines never meet, —a fact we all accept, has been the subject of debate among non-Euclidean mathematicians, who contend that they meet at infinity (Morris Cohen—"Reason and Nature" p. 173). What, therefore, can be left for a forum to discuss? The answer is that controversy exists in everything. *It depends upon who the speaker is and who the listener is.* If a listener accepts everything a speaker says, there can be no controversy.

Therefore, the criterion for determining the grant of the use of the premises upon the basis of lack of controversial subject matter has no basis in sound sense.

The Statute as Construed and Applied Is a Denial of Due Process on the Ground of Vagueness and Indefiniteness

The Supreme Court, Westchester County, construed the statute to authorize the denial of permission to

use school property for speech when the subject is "controversial".

The Court said (R., fol. 45):

> "Many factors may be taken into consideration by the administrative body in making its determination. The board is presumed to have knowledge of local conditions and to know the sentiment of the taxpayers and voters in the district. Assuming that a proposed use is in itself legitimate, a board of education may still find that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request, the granting of which would result in dissatisfaction and criticism (*Matter of Women's Civic Club of Katonah, Inc.,* 31 State Dept. Rep., 396, 397; *Matter of Vernon High School Alumni Association,* 15 State Dept. Rep., 476).
>
> In this connection a quotation from Appeal of American Civil Liberties Union (36 State Dept. Rep., 97, 98) is apropos. It was there stated: 'Schools are established and maintained for a definite and specific purpose, to wit, the secular education of the youth of the State, and any activity within the scope of that purpose or tending to promote the welfare of the schools and the community should be allowed and encouraged. On the other hand, any activity which is not embraced in the general school program and which is of a controversial nature liable to arouse ill feeling, jealousy or dissension, or to lead to misunderstanding, should be rigidly debarred. By pursuing this policy in the past our public schools have maintained the confidence and respect of all elements, classes, creeds and factions. The

> public schools are supported by the whole body of citizens; within their walls assemble the children of the rich and the poor, the children of parents of every shade of religious belief and unbelief. The children of almost every race and color. Therefore, nothing that will tend to foster intolerance, bigotry, animosity or dissension should be allowed to inject itself into the public school system of this great State.'
>
> The objects and purposes of petitioner's organization as set forth in the petition, and the proposed subject of the forum discussions impress this Court as being of an essentially controversial nature."

There is no proof in the record as to what the subject of the meeting was going to be. Nevertheless, even if it were known, then to characterize it as "controversial" is to fix no standard, because it is uncertain, indefinite and vague. What is "controversial" may cover the gamut of all speech and literature. It has a kinship of vagueness with that condemned in *Winters* v. *New York,* 333 U. S. 507, where this Court struck down for uncertainty, a statute penalizing publications, principally made up and massed together of stories of crime, bloodshed and lust. See also *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495.

It, therefore, cannot be urged that a standard exists that governs the discretion of the respondents. From a practical standpoint, respondents could say in advance that any speech would be controversial. If in this instance they announce that a discussion of *peace* would be controversial, then what limit is there to this unfettered discretion that respondents assert?

The Statute and Regulation as Construed and Applied Are a Denial of Due Process in That They Create a Censorship of Speakers

(a) If the forum is denied because the subject matter is "controversial" in the sense that emotions may be aroused or exception taken to a speaker's utterances, then such construction and application of the law runs afoul of prior rulings of this Court.

In *DeJonge* v. *Oregon,* 299 U. S. 353, this Court said:

> "While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application * * * Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment to the Federal Constitution * * * The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States* v. *Cruikshank,* 92 U. S. 542, 552, 23 L. Ed. 588: 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.' The First Amendment of the Federal Constitution expressly guarantees that right against abridgement by

Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. *Hebert* v. *Louisiana,* 272 U. S. 312, 316, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 1102; *Powell* v. *Alabama,* 287 U. S. 45, 67, 53 S. Ct. 55, 63, 77 L. Ed. 158, 84 A. L. R. 527; *Grosjean* v. *American Press Co.* (297 U. S. 233, 56 S Ct. 44, 80 L. Ed. 660), *supra.* These rights may be abused by using speech or assembly in order to incite violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government * * * The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights

of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offense, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge. We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that party."

In *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, at p. 640, this Court said:

"Struggle to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men."

At page 642:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

See also:

Terminiello v. *Chicago,* 337 U. S. 1;
Feiner v. *New York,* 340 U. S. 315;
Niemotko v. *Maryland,* 340 U. S. 268.

(b) The odd part of the application of the statute and regulations, as construed, to this petitioner is that there is nothing in the record to show what the subject of the speech was going to be. All that Special Term relied upon to determine that the subject was going to be "controversial" was the fact that the *objects* of the organization was to talk on peace and war. The talk might have been as peaceful and free from disturbance as on the day the Quakers spoke at the Young Women's Christian Association, above referred to. For the respondents and Special Term to conclude without proof what the subject was going to be is sheer censorship without the slightest foundation.

(c) Assuming the meeting at the Young Women's Christian Association had the character the respondents give it then, it is submitted, that this Court held also in the *Kunz* case, above, that disorderly prior utterances or reactions of listeners does not warrant suppression of the use of public property for speaking.

Said this Court:

"The court below has mistakenly derived support for its conclusion from the evidence produced at the trial that appellant's religious meetings

had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence. 'In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment.' *Near* v. *Minnesota,* 283 U. S. 697, 715, 75 L. Ed. 1357, 1367, 51 S. Ct. 625 (1931). We do not express any opinion on the propriety of punitive remedies which the New York authorities may utilize. We are here concerned with suppression—not punishment. It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action."

POINT V

There has been discrimination against petitioner.

The Respondents have been arbitrary in denying the use of the school not only because they refused to give a reason for the denial, not only because the subject of the forum may be or is "controversial", but because nothing in the law permits them to deny the use to the petitioner's organization where they have been granted to so many others. Paragraph "15" of the petition (R., fol. 31) alleges that organizations similar to petitioner's have been granted permission to use the schoolhouses of Yonkers for public forums on innumerable occasions. The failure by respondents to deny paragraph "15" of the petition

is an admission of the use to which the school properties have been put. Since no reason was given why the petitioner has been selected for denial, it is obviously a discrimination.

The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. *Yick Wo* v. *Hopkins,* 118 U. S. 356, at page 374.

Nor is there anything in the record that shows a reason for such discrimination other than the argument of counsel and the opinion of Special Term that the subject of peace is "controversial". It is thus an unconstitutional discrimination forbidden by the Federal Constitution. *Yick Wo* v. *Hopkins,* 118 U. S. 356 at 369; *Niemotko* v. *Maryland,* 340 U. S. 268, *Skinner* v. *Oklahoma,* 316 U. S. 535.

POINT VI

The Courts below were in error.

The Courts below grounded their rulings on the unlimited discretion of the respondents to deny the use sought. Therefore, they concluded, the petitioner showed no clear legal right to relief. Accordingly, the petition for a mandamus order was denied.

Since it has been demonstrated that the acts of the respondents in denying the facilities to petitioner was a denial of their constitutional rights of speech and assembly, the petitioner has shown a legal right to relief.

CONCLUSION

The order below should therefore be reversed, and this Court should remand the case to the Court below, to make an order not inconsistent with this Court's determination in accordance with the points urged herein.

New York, New York, August 23, 1954.

Respectfully submitted,

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APPENDIX A

Opinion of Appellate Division

281 App. Div. 987, Case No. 4.

Matter of Ellis, ap (Dixon, Jr., res)—In a proceeding under article 78 of the Civil Practice Act to compel respondents to grant permission for the use of a school building by an unincorporated association of which petitioner is president, petitioner appeals from an order which denied his application and which granted respondents' cross-motion to dismiss the petitioner. Order unanimously affirmed, with $10 costs and disbursements. The proceeding was properly before the court. However, the petition does not allege facts which establish a clear legal right to the relief sought nor which establish that respondents failed to perform a duty enjoined by law.

APPENDIX B

§ 414. Use of Schoolhouse and Grounds Out of School Hours

Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such school-houses, grounds or other property, when not in use for school purposes, for such other public purposes as are herein provided. Such regulations shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or

board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district when not in use for school purposes, for any of the following purposes:

1. For the purpose of instruction in any branch of education, learning or the arts.

2. For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

3. For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be nonexclusive and shall be open to the general public.

4. For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of United States and organizations of volunteer firemen.

5. For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no political meetings shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so

granted shall continue until revoked in like manner and by the same body as granted.

6. For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be nonexclusive and open to the general public.

APPENDIX C

Rules and Regulations for Use of School Buildings and Grounds

YONKERS BOARD OF EDUCATION
YONKERS, N. Y.

1. All applications for the use of public school buildings and grounds shall be made in writing upon the forms of the Board of Education and submitted to the Secretary of the Board of Education at least fifteen days in advance

of the date requested. No reservation shall be valid until said application has been filed and approved in accordance with the provisions of these rules.

2. The use of school buildings and grounds after school hours shall be governed by Section 414 of the State Education Law and Section 4 of Article XI of the New York State Constitution.

3. All affairs in the public schools must be non-exclusive and open to the public without charge, except when the proceeds of such affair are to be devoted to the purposes set forth in Section 414 of the State Education Law.

4. When admission is charged the applicant shall be responsible for the payment of any and all State and Federal taxes.

5. Whenever school buildings or grounds are desired for school activities after 5:00 P. M. on school days or on Saturdays the same application shall be required.

6. School activities shall take precedence over any non-school activity.

7. All fees charged for the use of school buildings or grounds must be paid at least five days in advance of the date reserved, and no permits shall be postponed or cancelled by the applicant unless the request for such postponement or cancellation shall have been received and approved at least five days prior to the date stipulated in the permit.

8. All non-school organizations desiring to use school property shall be required to file with the Secretary of the Board of Education an approved form attesting that they are not subversive and fully conform to all provisions of statute and regulations as established by the State of New York and/or the Board of Education of the City of Yonkers, New York.

9. The custodian shall be the representative of the Board of Education and shall be responsible for the enforcement of the rules and regulations of the Board. The term "Custodian" as used herein, is intended to mean the head custodian of a building, or any member of his staff who is in charge of the building at the time of its use by any organization.

10. The permit shall include the services of the custodian and his assistants in the performance of their regular duties. These duties do not include the setting or aiding in setting up of scenery or special stage equipment, moving furniture or other heavy equipment. He may, however, be required to place chairs or tables where needed.

11. The showing of motion pictures in the public schools shall be subject to the following regulations:

a. Incandescent lamps exceeding 1000 watts may not be used.

b. Only safety film may be used. The use of 35 m.m. nitrous oxide film is forbidden. Any variation from this regulation must be approved by formal resolution of the Board of Education and written consent of the Chief of the Yonkers Fire Department.

c. All electrical installations must be in conformity with local and state fire and safety laws.

12. No cash prizes, drawing for cash, or playing of games for cash shall be permitted.

13. A building-use permit does not allow the subletting of any portion of the building.

14. Both the individual signing the application and the organization which he represents shall be held responsible for any breakage or damage to supplies, equipment, buildings or grounds.

15. Smoking, the use of intoxicants or profane or indecent language or conduct shall positively be prohibited in any and all parts of the school building.

16. The use of any building when not in use for school purposes and up to 5 P. M. on school days may be obtained upon approval of the principal of the school. No other approval is necessary except where admission is to be charged in which event the Secretary of the Board of Education shall be notified in advance as to the amount of said admission charge, in order that the Collector of Internal Revenue may be notified. The principal shall refer any questionable application to the Permit Committee, consisting of the Superintendent of Schools, the Deputy Superintendent of Schools, the Secretary of the Board of Education, for appropriate action.

17. The multiple use of school buildings shall be encouraged in order to effect more economical operation of the physical plant.

18. No school building may be used after 12:00 o'clock midnight.

19. Special permission from the Board of Education must be obtained for Sunday use of school property.

20. Athletic fields, for other than school activities, may be used only by special permission of the Board of Education.

21. There shall be no reduction of fees for summer use of school property.

22. The rental permit shall state the exact portion of building to be used and organizations shall be required to conform.

23. No member of the custodial staff may be required to work more than two nights per week for activities other than those which are associated with his regular duties.

Appendix C.

24. The Secretary of the Board of Education shall refer any questionable applications to the Permit Committee as outlined under rule No. 16.

25. The Board of Education expressly reserves the right to refuse, deny, or revoke the right to use public school property, whenever, or wherever such action or refusal is deemed by the Board of Education, in its sole judgment, to be in the best interests of the public schools.

26. All service and custodial fees collected under these regulations shall be credited to a revolving fund in a manner prescribed by and acceptable to the proper administrative officers of the City of Yonkers and the Board of Education of Yonkers, N. Y. Proceeds of such fund shall be used to pay custodial services and pay the cost of heat, light, fuel and custodial maintenance supplies.

27. The fees for the use of school buildings and property shall be as follows:

BUILDING USE FEES

Service Charges—after 5 P. M.

	Auditorium	*Gymnasium*	*First Classroom*	*Additional Classroom*	*Cafeteria*	*Kitchen*
Roosevelt High School Gorton High School Yonkers High School Commerce High School Saunders Trades School Hawthorne Jr. High School	$50.00	$20.00	$5.00	$2.50	$25.00	$2.00
Schools #1 and #26	10.00	10.00	5.00	2.50	25.00	2.00
All other schools	25.00	10.00	5.00	2.50	25.00	2.00

Service charges for rehearsals—one half the regular charge

Classrooms used in conjunction with auditorium, gymnasium or cafeteria facilities shall be at the rate for additional classrooms.

Appendix C.

Custodial Fees (per employee, regardless of multiple use of buildings)

$5.00 for the first three hours up to 11 P. M.—Monday through Friday

Overtime at the rate of $.75 each additional half hour up to 11 p. m. and $1.50 each half hour or fraction thereof after 11 P. M.

$3.00 per hour per man for Saturday, Sunday and Legal Holidays

The Recreation Commission, Boy Scouts, Girl Scouts and approved Civil Defense organizations shall not be charged a service fee for the use of any portion of a building except when admission is charged. When admission is charged the regular service fees shall be charged.

Organizations of the Yonkers Public Schools, Parent-Teachers Associations, Neighborhood Councils or Senior Councils of the Yonkers Public Schools shall not be charged a service fee at any time for any use of public school buildings.

Any Yonkers community organization whose objectives are educational, cultural, and non-profit making within the meaning of the Education Law may be granted exemption from, or reduction of, service fees, if upon special application, considered at a regular Board meeting, such reduction or waiver of fees is deemed by the Board of Education in its sole judgment, to be in the community interest.

SPECIAL REGULATIONS

Auditoriums:

Piano and normal stage equipment may be used by arrangement with the school custodian.

Where special piano tuning is required arrangements shall be made with the Director of Music.

Appendix C.

Special equipment such as scenery, projectors or public address system may not be used without special arrangement.

Special lighting equipment may be used when it is a permanent installation of the auditorium.

Special or additional lighting equipment may be used only under the supervision of a licensed electrician and all temporary wiring or changes in wiring must be approved by the Supervisor of Buildings of the Board of Education before operation will be permitted.

Gymnasium:

Rental of gymnasiums shall include the use of locker and shower rooms where available.

Special equipment or apparatus may not be used without special arrangement.

Cafeterias: (for use by outside groups for dinners, etc.)

School Cafeteria personnel shall be utilized as required at stated rates, arrangements for which must be made through the Director of School Lunch Programs.

Rental does not include use of the kitchen and cooking equipment without special permission obtained beforehand.

Kitchen Privileges:

This applies only to those schools having all purpose rooms.

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SUPREME COURT. U.S.

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IN THE

Supreme Court of the United States

October Term, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

—against—

WILLIAM DIXON, *et al.*, as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

REPLY BRIEF OF PETITIONER

EMANUEL REDFIELD,
Counsel for Petitioner.

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This brief is a reply to both the brief of the respondents and of the *amicus curiae.*

Respondents' brief in answer to the merits of the argument is (p. 4, its brief): "Without doubt members of a board in a school district know the sentiment of the taxpayers and voters of the school district in which they serve and, as pointed out by the Court (R. fols. 45-46), may find, even if the proposed use is itself legitimate, that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request, the granting of which would result in dissatisfaction and criticism."

Assuming that the law in New York can be so construed, such construction would still run afoul of constitutional requirements of clarity (*Winters* v. *New York, supra*). Such construction does not state how "community sentiment" is to be discovered. Is the vociferous objection of a few to be considered "community sentiment?" This Court has not yet considered noise as a substitute for the establishment of truth. Nor does such constructions answer the other objections in the Brief of the Petitioner.

As to the other mention in the Brief of Respondents as to the effect of its failure to deny the allegations of the petition sufficient response is found in *Joint Anti-Fascist Refugee Committee* v. *J. Howard McGrath,* 341 U. S. 123, 126, where it was held: "We conclude that, if *the allegations of the complaint are taken as true* (as they must be on the motions to dismiss) * * *" See also Respondents' own citation *High* v. *Board of Education,* 169 Misc. 98, aff'd 256 App. Div. 1074, aff'd 281 N. Y. 815, that for the purposes of a motion to dismiss, all the allegations of the petition are deemed true.

What seems to bother the Respondents is that they have not yet had an opportunity to answer the petition and furthermore, a direction by way of mandamus cannot be made by this Court. This doubt can be laid to rest by petitioner's request for relief in his brief, *i.e.,* that this Court reverse the order below, and remand same to conform with this Court's decision. Thus, the Respondents will have an ample opportunity to answer. This is fundamental procedure, and was so done in the *Anti-Fascist Committee* case, *supra.*

Reply to the Brief of *Amicus Curiae*

Taking Point II of the *amicus* brief first, the answers are as follows:

1. It is argued, that the attack upon the Regulation of the Respondents is not appropriate in this Court because, so it says, it was not raised in the lower Courts. Aside from the doubtful appropriateness of an *amicus* to inject questions, not related to the merits, since this Court's pronouncement in *Julius Rosenberg* v. *United States,* 346 U. S. 271, nevertheless,

(a) Even if the issue of the validity of the Regulation of the Respondents had not been raised below, there still remains before the Court

(i) The question of unconstitutional application of the state law, Section 414 Education Law, both in discriminating against the Petitioner and in applying it without any standards.

(ii) The validity of the Regulation was raised and is embraced in the broad allegations of the petition (R. fol. 33, 34) and in the broad "Specification of Errors to be Urged" p. 8, "Petition for a Writ of Certiorari". The making of the Regulation is an act of the Respondents which is, in any event, a part of the conduct complained of.

What the *amicus* really objects to is that Petitioner's Brief here is more specific, more carefully prepared and more articulate. We are hopeful that the Court does not look upon such effort with disfavor.

(b) As to the argument that the appeal should have been made to the Commissioner of Education, touching

only on this question of the validity of the Regulation, the answers are three:

(i) The Appellate Division held in this case (Brief of Petitioner, p. 39) that an appeal to the courts is an appropriate remedy. Its decision was compelling in face of the State decisions cited on pages 3 and 4 of Brief of Petitioner.

(ii) The decisions of this Court, cited on page 3 of Brief of Petitioner, particularly the *Ben Avon* case, hold that a denial of a constitutional right cannot be shielded by a denial of review by the Courts. The New York law clearly states that once an appeal is taken to the Commissioner of Education, it is final and no review can be had in the Courts. Section 310 Education Law, in Appendix A of *amicus'* brief. *Chapin* v. *Board of Education,* 291 N. Y. 241. How is a citizen to have his constitutional rights protected if he is to meet a dead end on the avenue to a review?

(iii) In any case, the *amicus'* argument is addressed to instances where an attack is made on the Regulation only. There still remains before the Court, the challenges presented here of the unconstitutional application of the law to this Petitioner. So that even if merit (as well as appropriateness) is found in the contention of the *amicus* that the attack on the validity of the Regulation of the Respondent may only be by appeal to the Commissioner, despite the decision of the Appellate Division to the contrary, nevertheless, there is still before the Court, without dispute, the question of the unconstitutional application of the law.

2. It is argued by the *amicus* that this Court should not pass upon this question until after a construction is made by the Courts of New York. The reply is as follows:

(a) The State Courts have construed this law and have passed upon the actions of the Respondents. See, opinions of Special Term and of the Appellate Division. If the Court of Appeals did not construe the law, it is because it refused to pass upon the question. A similar situation is found in the *Niemotko* case. This Court did not refuse to review or pass upon the denial of free speech there, because the highest Court of Maryland refused to review. This Court passed upon the actions of the lower Courts and the public officers who had denied, arbitrarily, the right to use a public place for speech.

(b) In any event, the Commissioner of Education has construed the statute exactly as the Respondents did, that there is unlimited discretion. (*Matter of Mauersberger*, p. 27 of brief of *amicus curiae*.)

(c) If the *amicus* argument were to be accepted that Petitioner has to wait for a construction by the highest Court then this Petitioner would be without a remedy, even though it is plain that his rights have been infringed.

(d) In any event, the statute and Regulation are plain, but infirm against constitutional challenge. What was done here is perfectly clear, and is admitted both by Brief of Respondents and at Special Term, to wit, that the Petitioner was denied the use of the premises because of the

controversial nature of Petitioner's organization and the subject of speech (R. fol. 49).

3. As to Point I of the *amicus*, it is only fair to state that the matter has been covered in Brief of Petitioner, to which reference is made as to what Petitioner actually argues. Only a word should be added about the *Danskin* case. It was a much stronger case for the school board than this one. There, the objection was based upon a refusal of the applicant to take a test oath. Here, there is no such problem. Petitioner took special pains in Brief of Petitioner, p. 17, last line, to state, "Justice Carter who concurred stated the following *which seems more pointed toward a determination of the issues in this case*". Then follows a statement of principles that are applicable to this appeal.

Respec ully submitted,

EMANUEL REDFIELD,
Counsel for Petitioner.

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Upon the original argument certain questions were raised that should be discussed in this supplemental brief.

(1)

Wherever a question has arisen about access to public property for the purpose of speech and assembly, there has been recognition of the distinction between the prim-

ary purpose of the facility and the secondary one of public assembly. In the case of streets, the primary use is that of movement of people and traffic. In the case of parks, it is that of recreation, health and esthetics. In the case of schools, the primary purpose is that of education. Therefore, there is nothing singular in the case of school buildings about the existence of a purpose prior to that of public assembly.

(2)

Such use of school buildings is provided by Section 414 of the Education Law of New York. The applicable subdivisions of that law are "1" and "3" and "Rules and Regulations for Use of School Buildings and Grounds" (Appendix C in Brief of Petitioner).

(3)

It was conceded by the respondents and the *amicus* on the argument that school buildings may be used for political speeches and political assemblies. It was admitted that in such case, under the statute and Rules, the respondents could grant the use to Republicans, but could refuse the use to Democrats. It was admitted in answer to the Chief Justice's question that a Peace Party (which would bear an infinity to petitioner) could be denied use under such application of the law and Rules.

(4)

This case primarily is governed by what was said and decided in the *Niemotko, Kunz* and *Feiner* cases. It is

especially related to the *Niemotko* case both procedurally and substantively.

In *Niemotko* the defendants were convicted for disorderly conduct by holding a religious meeting in a public park without a license. Although no ordinance regulated the use of the park, there was a custom to obtain permits from the Park Commissioner for its use for public meetings.

Permission for such use was refused to defendants. Subsequently, they filed a written request for future open dates. This request was refused. After the denial of the permit, the defendants held the meeting. They were thereupon arrested and convicted. It was decided by this Court: (1) This Court may review the decision even of the trial court, even though there was no prior review at an appellate level, when in fact a review was refused in the State court; (2) When a claim is made of a denial of rights under the Federal Constitution, this Court will review the evidentiary basis of the conclusions; (3) No standards existed for determining the limits of the discretion to be exercised by the public official. Therefore, a mode existed for censoring the speech in violation of the Constitution; (4) Woven into the fabric of this lack of standards was an obvious discrimination. *Nowhere in the record was there a ground given for the refusal of permission.* The instant case too, presents such lack of adequate reason for refusal, where others have been granted the use; (5) In *Niemotko* there was no showing of a systematic discrimination against Jehovah's Witnesses. This Court merely drew an inference that the discrimination was based on their views. In the instant case, too, the discrimination

can be inferred from the alleged views of the organization. Moreover, it was stated by both respondents and Special Term that the discrimination was on similar grounds (R. 17, top, and Respondent's Brief in Opposition to Writ of Certiorari p. 6).

(5)

It must be emphasized that it is the law of *this* case—as distinct from some hypothetical one, that the petitioner rightfully appealed to the courts, instead of appealing to the Commissioner of Education. It was so held by the court of final review in this case, 281 App. Div. 987, Case No. 4. This should have foreclosed any further discussion of that question. It should also have precluded any hypothetical problem as to what would have happened if a review had been sought from the Commissioner.

But to those interested to know what would have happened, reference is made to the case of *Matter of Mauersberger* cited on page 27 of the brief of *Amicus Curiae,* decided by the Commissioner of Education on May 2, 1935. It was there held, as respondents here have held, that unlimited discretion to grant the use rests with the Board of Education, and furthermore, that the organization dealt with "controversial" subjects was sufficient reason for refusal. Could a closer parallel exist? It is obvious that an appeal to the Commissioner would have been a futility.

As stated, the holding of the Appellate Division is the law of the case and is binding. True, its memorandum is terse, but it clearly holds that petitioner rightfully appealed to the courts, instead of proceeding for an adminis-

trative review by the Commissioner. But for those who would now question that holding of the Appellate Division in an attempt to prevent this court from deciding the important and recurrent problems of civil liberties involved in this case, it is respectfully submitted that the cases presented beginning at page 3 of Brief of Petitioner (citation of *Re Oliver*, 233 U. S. should be 333 U. S.) sustain the Appellate Division. The text of Section 310 and the cases hold (1) that the petitioner had the choice of either going to the Commissioner or to the courts; (2) if he had appealed to the Commissioner, he could not thereafter appeal to the courts. He could appeal to the courts whenever there was a claim of arbitrariness or of unconstitutionality. (*Sloat* v. *Board of Education*, 274 N. Y. 367 at 370 and 374 as to arbitrariness; Opinion Education Department 60 St. Dept. 17 as to constitutionality.) See *Slochower* v. *Board of Education*, in this Court, Docket No. 466, October Term, 1954, certiorari granted and awaiting argument. There, the petitioner also had a review granted in the courts relating to a Board of Education instead of pursuing an appeal to the Commissioner, same case, 306 N. Y. 532; 282 App. Div. 718. Cf. *Barsky* v. *Board of Regents*, 347 U. S. 442.

(6)

Some comment was made by respondent's counsel at the argument that the denia of leave to appeal by the Court of Appeals had some sig ificance with respect to the merits of this case. See *Niemot o* case, showing that there is none to be inferred. See also, *Marchant* v. *Mead-Morrison Manufacturing Co.*, 252 N. Y. 284. In New York, an aggrieved

person may appeal either as a matter of right or by permission (New York Civil Practice Act, Section 588, subd. 1(a); Section 589, subds. 2 and 3). There is no generous provision of practice as exists in this court, that if review is mistakenly taken by appeal, the court may treat it as an application for a writ of certiorari. No inference can be drawn from the fact that resort was first made, as here, by application for leave to appeal. The use may depend upon experience of counsel or the judgment of the moment.

(7)

"Reply Brief of Petitioner" page 3 (to which reference is requested) has answered the questions raised by the *amicus* that an attack on the Rule 25 as distinct from its applications should have been appealed to the Commissioner. Furthermore, as Mr. Justice Frankfurter observed at the argument,—courts take judicial note of the Rule, and, therefore, it was before the Appellate Division.

There is no practical distinction between the Rule and its application by respondents in this case. The Rule states that the Board arrogates full discretion to itself. The Board, in applying the State statute, in this case contends that it has full discretion. It is, as if the Board in reply to the request of the petitioner had sent him a refusal with a copy of the text of Rule 25. There is no distinction between the text of the Rule and its application, both of which petitioner challenges here.

(8)

If the petitioner had appealed to the Commissioner then by reason of the text of Section 310. Education Law and by construction, *Chapin* v. *Board of Education*, 291 N. Y. 241, he would have been barred from appeal to the courts.

(9)

In any event, there is squarely before this Court the question of the application of the law to this petitioner. In this connection, it should be emphasized that there are two facets to the argument, (a) that there was censorship; and (b) related to censorship, as in *Niemotko*, is the question of discrimination. The allegation of censorship is found in paragraph 18 of the petition below (R. 12). The allegation of discrimination is found in paragraphs 15, 16 and 17 (R. 11). They allege that respondents refused to give a reason (see *Niemotko*, where the inference of discrimination was drawn from this fact). It further alleges discrimination (paragraph 15) that other organizations were permitted to use the school for purposes of assembly and discussion, whereas (paragraph 17) such permission was refused to petitioner. In the *Niemotko* case, it was not necessary to show a systematic exclusion. In that case, it was not necessary to show that the use was granted specifically to a religious group of Jehovah's Witnesses type, but was refused to the Jehovah's Witnesses. *Niemotko*, went further. It did not even require that it be shown that the park was used for religious assemblies. All it required to be shown is that others were permitted to use the park for public assembly, but Jehovah's

Witnesses were excluded. That is what petitioner alleges here.

In any event, this is a proceeding in which a pleading alone is involved. At a hearing, facts can be adduced to show what the plan of discrimination was. In connection with the other part this argument, to wit, censorship, it is admitted by the respondents that the reason the petitioner was rejected is that the organization is "controversial." What clearer analogy can there be to the *Niemotko* case?

(10)

In connection with these arguments, reference is made to the observation made in the *Cantwell* case (*Cantwell* v. *Connecticut*, 310 U. S. 296) at page 306, that the existence of a right of appeal to the courts to redress the censorship imposed does not save the law, if it has potentialities of restraining speech.

(11)

A further word is necessary to be added to what petitioner stated on page 5 of "Reply Brief of Petitioner". The *amicus* has urged that a decision be postponed until after the highest court in New York has construed this law. The *amicus* cited (p. 16) the case of *Federation of Labor* v. *McAdory*, 325 U. S. 450, for the proposition. The *amicus* also notes that the case was one for a declaratory judgment. An action for declaratory judgment however is one that is addressed to the discretion of the court. There is latitude for granting or withholding decision. Judgment in such a case can be refused. But this case

seeks a remedy for the enforcement of a right. The remedy cannot be postponed. This petitioner seeks relief now. It is his own constitutional right that is sought to be vindicated. It should be determined now. The New York Board of Education construed the law, the Attorney General of New York construed the law, the Supreme Court of New York construed the law, the Appellate Division construed the law. The Court of Appeals refused to act. The petitioner has exhausted all State remedies, and reached the end of road in his search for constitutional protection. Why should there be further delay to obtain a remedy for exercising the supposedly simple right to speak in public?

In all events,—and this submitted only as a last resort, that if word must come from the State court in clarification then *Musser* v. *Utah*, 333 U. S. 95 suggests that the case be returned for clarification.

(12)

It is a sufficient answer, however, which cannot be obscured by these last moment defenses, that the Appellate Division, the highest court, has ruled, as the law of this case, that resort to the Commissioner was not necessary. The case is therefore, free from State law questions, and is ripe for a decision on the important Federal attack.

Respectfully submitted,

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(1)

This brief is submitted to accompany the exhibit herewith enclosed, which were requested by the Court. The exhibit consists of the petitioner's application for leave to appeal to the Court of Appeals. Also enclosed, as an aid

to the Court is the respondents' brief in opposition to that application.

Preliminarily, it should be stated that at no time did counsel for the respondents raise the question that Mr. Justice Harlan raised at the argument, to wit, that the failure of the petitioner to avail himself of an alternative remedy of direct appeal to the Court of Appeals instead of by application for leave to appeal left open a state law question.

(2)

The exhibits will indicate that in the Court of Appeals, as in all courts, the petitioner directed his petition to the constitutional issues involved. From the nature of the case this could be the only intelligent attack to the problem. It was the core of the allegations of the petition in the lower court that the right to speak was denied in violation of constitutional guarantees. In the Appellate Division this same argument was again presented along with the argument that the petitioner correctly appealed to the courts for relief. The Appellate Division held that petitioner's contention was correct in that he had a right to appeal to the courts. That is the law of the case now. The Appellate Division also held, however, that petitioner had no legal right to redress, thereby supporting respondents' contention in that court, that the respondents had absolute discretion to determine who was to be afforded the right to use the school building for speech.

In the Court of Appeals, the identical questions were presented by the petitioner, as the exhibit will show. In fact, in "Respondents' Brief in Opposition to Motion for

Leave to Appeal to the Court of Appeals," enclosed herewith, at page 5, under "Conclusion" the respondents state, "The questions raised by petitioner's attorney in this application have all been given due consideration by the Appellate Division and an appeal to this Court is not required in the interest of substantial justice."

That brief in opposition directed itself to two points. First, because the board of education has discretion to choose who may use the school facilities and that they exercised their discretion reasonably against these petitioners. Secondly, since the respondents' power was discretionary, the petitioner has failed to show he had a legal right.

Nowhere in that opposition brief is there any objection of any procedural nature.

Petitioner's application for leave to appeal contends as he had argued in all prior courts and as he does in this Court, that there was no discretion in respondents to choose who may speak and what they may speak about, so long as there is no clear, present and imminent danger to the community and no law is violated, and, furthermore, there are no standards fixed that circumscribe and define the respondents' discretion. Since this is a country of laws and not men, it is necessary that clear rules of conduct be set forth. Furthermore, petitioner has argued that he was discriminated against because others have been permitted to use the school facilities for assembly and discussion and not he.

At no time either by briefs or at the arguments, have the respondents or *amicus* contended that this Court is with-

out jurisdiction to decide this case, because of any possible remaining state questions. Since the granting of a writ is attended with care and requires the approval of at least four justices, a presumption of jurisdiction should exist.

Because the problem presented in this review is a recurrent one, as was indicated by the petition for the writ, there should be enthusiasm, rather than resistance to settle this question.

This is not said out of weakness or doubt of petitioner's jurisdictional position. Rather, since petitioner has from the very beginning raised the federal constitutional question, and has pursued it until he exhausted his state remedies, jurisdiction rests in this Court to redress the denial of constitutional protections.

(3)

In New York, an aggrieved person may appeal to the Court of Appeals in two *alternative* ways. He may appeal as a matter of right where a constitutional question is involved (Section 588 sub. (a) New York Civil Practice Act), or he may apply for leave to appeal by permission (Section 589 of that law). There is nothing in New York law that requires that an appeal be pursued as of right. Indeed, there is an element of risk involved.

A lawyer may feel that there is an important constitutional question involved, yet that Court might regard it as insubstantial or not "directly" involved. That Court may make such disposition upon motion to dismiss before argument is set (see for instance, *Matter of Hill* v. *Lyman*, 306 N. Y. 739).

This Court, however, may be of a different opinion and regard the constitution question as substantial.

Therefore, lawyers with considerable experience in that Court will in a given case not speculate or gamble with an appeal as a matter of right, but will move for leave to appeal. This is the practice suggested and encouraged by this Court in *Stratton* v. *Stratton*, 239 U. S. 55, at page 56, bottom line.

If that Court should determine that the appeal is available as a matter of right, it may deny leave, and state that its denial is based on the existence of the right to appeal (see, for instance, *Matter of Hecht* v. *Monoghan*, 305 N. Y. 800). But the Court of Appeals in denying leave to appeal did not state in this case that an appeal lay as a matter of right (R. p. 22).

That leave may be granted and considered on constitutional questions is authorized by Section 592 sub. 5(d) which reads as follows:

> "An appeal taken to the Court of Appeals pursuant to permission shall not be dismissed upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the proceedings to obtain such permission was begun within the time limited for an appeal as of right."

This answers any question that appeal on constitutional grounds cannot be by permission, as *amicus* contends in its brief.

The *amicus* brief when citing Section 589, "Appeal by Permission" on page 3 of its brief, fails to separate with

distinction subdivision (a) of subdivision 3, which is the subdivision that applies to this case.

Subdivision (a) reads as follows:

> "either
>
> (a) by permission of the appellate division granted before application to the court of appeals for permission to appeal, and in case of refusal of such permission, by permission of the court of appeals."

There is no qualification to this permissive alternative procedure. Nor does subdivision (b) cited by the *amicus* have any application here. That subdivision applies to a case where application is made in the first instance to the Court of Appeals, by-passing the Appellate Division. That is not what happened in this case.

For example, the Gold Clause Case of *Norman* v. *Baltimore & Ohio Railroad Co.*, 290 U. S. 240 was reviewed in the Court of Appeals *by permission* granted by the New York Appellate Division, under the statute similar to Section 589 sub. 3 sub. (a). There was without question a substantial and important constitutional question involved, which constitutional question could have been reviewed as a matter of right by the Court of Appeals. But the undersigned, out of abundance of caution applied for permission. The Court of Appeals found no fault with that procedure. This Court accepted jurisdiction.

Nash v. *Long*, cited by *amicus* hasn't the slightest bearing on this problem. It concerned itself with the jurisdiction of the Court of Appeals with respect to appeals to it from an inferior court of limited jurisdiction like the Municipal Court, when the Appellate Division denies

leave. In such cases the statute specifically provides that no further appeal may be granted by leave of the Court of Appeals. See Section 589, C.P.A., sub. 1 and sub. b. That is not the situation here.

Where the Court of Appeals has dismissed an application for leave to appeal, its rationale is *not* that the court is without jurisdiction, but rather, because it is *unnecessary*. See for example, *Matter of Fineman*, 258 N. Y. 423 and *Matter of Van Vliet*, 224 N. Y. 545. This clearly and unmistakably shows that an appeal by permission is an alternative proceeding and is within the jurisdiction of that court.

The undersigned communicated with Mr. Karger, author of the book quoted by the amicus, and Mr. Karger assured the undersigned that the statement verbatim in this brief of the practice in New York is correct, and that petitioner's practice in this case conforms thereto.

Therefore, the petitioner did all he could as Niemotko did (*Niemotko* v. *Maryland*, 340 U. S. 268) to be afforded an opportunity to use public facilities for speech. He exhausted his state remedies. To hold otherwise would mean that an aggrieved person *must* first appeal as of right and then, if dismissed, apply for leave. It would leave no alternative, even if New York law provides an alternative remedy. This is not necessary any more than the requirements in this Court. In this Court a litigant may apply by a writ of certiorari for review, even if he could have filed an appeal. Of course, this Court could dismiss and state that appeal lies. But that does not bar his procedure by a writ in the first instance.

Should petitioner have been required after the denial of leave to appeal to then file an appeal as a matter of right?

First of all, the time of petitioner to appeal as of right had expired, because sixty days had elapsed since the judgment of the Appellate Division had been entered and served (Section 592, subdivision 1, C.P.A.) The judgment of affirmance was served on May 26, 1953, and the Court of Appeals denied the motion on October 2, 1953 (R. p. 23). There is no provision for an extension of time, except in the case where the order of the Court of Appeals denies leave on the ground that an appeal lies as a matter of right (Section 592, subdivision 5 (a)). Secondly, there would seem to be no intelligence in appealing as a matter of right after leave was denied. Since the Court of Appeals did not deny the application on the ground that an appeal lay as a matter of right, it could reasonably be assumed by counsel that the Court of Appeals failed to find substantiality in the appeal on the merits. Therefore, there would be no sense in counsel going to the expense, waste of time and entanglement with procedural issues to then file an appeal as a matter of right. In the exercise of intelligence he can assume that if he was rejected he will remain rejected. To bring the matter closer to home—if this Court denied a petitioner a writ of certiorari it could not be expected that the petitioner would or should file an appeal.

Thirdly, if exhausting *alternative* state remedies means that a litigant is required to pursue every device open to him in the highest state appellate court, then it could be argued that an appellant had not exhausted his state remedies unless he had asked the highest state court for reargument of the decision there against him. It could even be urged in that case, that he should be required to

even apply for a second reargument or a third reargument. It is submitted that neither reason nor the precedents of this court require the pursuit of every conceivable remedy in the state courts. To do otherwise, would make a mockery of the jurisdiction of this Court, as well as place at a disadvantage the litigant who does not acquaint himself with every conceivable remedy and device available in the state court. It is sufficient that he exhausts his state remedies by pursuing a remedy, be it an alternative one, to gain the highest court's ear for redress of his grievance. See, *Norfolk, etc.* v. *Virginia*, 225 U. S. 264; *Honeyman* v. *Hanan*, 300 U. S. 14.

In *Stratton* v. *Stratton*, 239 U. S. 55, this Court encouraged counsel to pursue motions for leave to appeal to be on the safe side of jurisdiction in constitutional cases. This Court there said at page 56, bottom line, "Indeed, conforming to the rule thus thoroughly established, the practice for years has been in the various States where discretionary power to review exists in the highest court of the State to invoke the exercise of such discretion in order that upon the refusal to do so there might be no question concerning the right to review in this court. See *West. Un. Tel. Co.* v. *Grovo*, 220 U. S. 364; *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264; *St. Louis San Francisco Ry. Co.* v. *Seale*, 229 U. S. 156."

In *McMaster* v. *Gould*, 276 U. S. 284, this Court had occasion to view the New York practice as it then existed. But there, the *converse* situation was presented. There the petitioner boldly or mistakenly took his appeal as of right to the Court of Appeals. It was dismissed because it did not lie as of right. He came to this Court on certiorari.

This Court dismissed the writ for want of jurisdiction. That was the only disposition that could be made, because the petitioner had not applied for permission to appeal. But in the present case petitioner did apply for leave and it was refused. Petitioner's counsel was less bold than McMaster's and asked for permission in the first instance.

This shows how bedeviled and entangled the situation would become if petitioner's contentions are not sustained. A litigant would not know with any assurance where he stood. Contrary to accepted practice in this Court's requirment that he must make an attempt to be heard, he would only be safe if he pursued both remedies. He would be required to file an appeal, expend money for printing and costs, and if dismissed, ask for leave. *Stratton* says he should however preferably follow the latter course in the first instance.

Simkins, Federal Practice, Third Edition, Section 965, states: "This means that the highest state court in which a decision could be had must, in some form, have acted upon the case, either by reviewing it or *refusing to review it.*" * * * "In order that the jurisdiction of the Supreme Court of the United States may attach, *an attempt* must have been made to have the case considered by the highest court of the state in which a decision could be had."

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

J. RAYMOND HANNON,
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City of Yonkers, N. Y.

JOHN PRESTON PHILLIPS,
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IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. 534

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education, of the City of Yonkers, etc.,

Respondents.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This brief is respectfully submitted by the Office of the Corporation Counsel of the City of Yonkers, State of New York, in opposition to the prayer of the petitioner, James R. Ellis, as President of the Yonkers Committee for Peace, an unincorporated association, that a writ of certiorari be issued to review the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, affirming an order of the Supreme Court of the State of New York, County of Westchester, denying petitioner's application for an order requiring respondents to grant permission to the petitioner's organization for the use of a school building in Yonkers, New York, at a time and

place to be fixed in the order, and granting respondents' cross motion to dismiss the petition as a matter of law.

Respectfully submitted,

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Statement of Judicial Proceedings, New York State Courts, to Time of Filing of Petition.

The above entitled proceeding was instituted by petitioner, on or about the 30th day of January, 1953, for an order, pursuant to Article 78 of the New York Civil Practice Act, directing the respondents to grant the petitioner's organization the use of a schoolhouse in Yonkers for the purpose of a forum for the discussion of peace and war. In the petition to the Supreme Court of the State of New York, County of Westchester (Record, fols. 15-35), petitioner alleges that he is president of the Yonkers Committee for Peace, an unincorporated association, formed among residents of the City of Yonkers and of Westchester County for the object of arranging forums for the discussion of problems relating to peace against war (Record, fols. 16-20); that on May 14th, 1952 (Record, fol. 22) and on October 31, 1952 (Record, fol. 28) he made application to the respondents for permission to use the auditorium of one of the schools for the purpose of a forum for the discussion of peace and war and that the respondents denied such permission (Record, fols. 23-29). In paragraph 2 of the petition (Record, fols. 16-21) a statement of the purposes of the organization are set forth. Petitioner further alleges that respondents did not inform him of the reason for the denial of his application (Record, fol. 32); that respondents are concealing a design to discriminate against him and his organization and that the acts of respondents are arbitrary and unreasonable (Record, fol. 33) and violate the right of petitioner and constituent members of his organization of freedom of speech and assembly guaranteed by the Constitution of the United States and deny them the equal protection of the laws in violation of the Constitution of the United States (Record, fol. 34).

Respondents, pursuant to the provisions of section 1293 of the New York Civil Practice Act, moved to dismiss the

petition as a matter of law upon the ground that the petition is insufficient in law in that it does not state facts to constitute grounds for the relief sought therein; that the petition fails to show a clear legal right of petitioner to the relief demanded or to any other relief on the merits; that the petition does not state facts to establish that the respondents failed to perform a duty specifically enjoined upon them by law, and that the refusal of respondents to grant permission to petitioner's organization could be adequately reviewed by an appeal to the Commissioner of Education of the State of New York (Record, fols. 36-39).

After argument at a Special Term of the Supreme Court of the State of New York, the Court denied the application and dismissed the petition on the ground that the procedure under Article 78 of the New York Civil Practice Act was not available to petitioner and that the exclusive remedy was by an appeal to the Commissioner of Education. The opinion of the Court is set forth in full on pages 14-19 of the Record.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, the Court unanimously affirmed the order of the Court below and held that the proceeding was properly before the Court but that the petition did not allege facts which established a clear legal right to the relief sought nor which established that respondents failed to perform a duty enjoined by law (*In the Matter of James R. Ellis, as President of the Yonkers Committee for Peace, an Unincorporated Association, Appellant, against William Dixon, Jr., et al., as Members of the Board of Education of the City of Yonkers, Respondents,* 281 App. Div. 987).

A motion for leave to appeal to the Court of Appeals was denied by the Appellate Division of the Supreme Court of the State of New York, Second Department, and by the Court of Appeals of the State of New York.

ARGUMENT

I.

The petition does not state facts to establish that the respondents have failed to perform a duty specifically enjoined upon them by law.

The petition (Record, fols. 15-35) does not allege that respondents, in refusing to grant to petitioner and his organization permission to use a school auditorium for the purpose of holding a forum for the discussion of peace and war, have failed to perform a duty specifically enjoined upon them by law.

To compel the issuance of a permit for the use of school property petitioner must show that the duty of respondents to issue such permit is positive and not discretionary.

> *Matter of Burr* v. *Voorhis*, 229 N. Y. 382;
> *Matter of Colonial Beacon Oil Co., Inc.* v. *Finn*, 245 App. Div. 459, 461;
> *Matter of Burbridge* v. *Mangan*, 173 Misc. 233, 237;
> *Section 1296, New York Civil Practice Act.*

Mandamus cannot be used to compel or control a duty by an officer in the discharge of which, by law, he is given discretion.

> *Hubert Work, Secretary of Interior* v. *United States on the Relation of Logan Rives*, 267 U. S. 175;
> *Hubert Work, Secretary of Interior* v. *United States ex rel. Chestatee Pyrites & Chemical Corporation*, 267 U. S. 185.

II.

The petition fails to show a clear legal right of the petitioner to the relief demanded or to any other relief on the merits.

Section 414 of the New York Education Law provides that the trustees or board of education of each school district may, subject to regulations adopted by them or it, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes, for any of the purposes set forth in said section.

The authority to grant permission for the use of school property, under section 414 of the New York State Education Law, is discretionary and not mandatory.

Opinion of New York Attorney General,
51 (N. Y.) State Department Reports 135;
Opinions of New York Commissioner of Education,
31 (N. Y.) State Department Reports 396;
36 (N. Y.) State Department Reports 87;
43 (N. Y.) State Department Reports 168;
50 (N. Y.) State Department Reports 501.

As pointed out in the opinion of the Supreme Court of the State of New York, Westchester County (Record, fols. 41-55), many factors may be taken into consideration by the administrative body in making its determination, and the board is presumed to have knowledge of local conditions and to know the sentiment of the taxpayers and voters of the district and may find that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request the granting of which would result in dissatisfaction and criticism. Unquestionably the respondents had knowledge of the fact that a forum held

by the Yonkers Committee for Peace at the Young Women's Christian Association in the City of Yonkers on November 19th, 1951 created considerable dissatisfaction and criticism among some of the citizens and veterans organizations of the City, the forum having been publicized in many issues of the local newspaper before and after it was held and took this into consideration when they refused to grant permission to petitioner's organization for the use of school property to hold a forum for a discussion on war and peace. The objects and purposes of petitioner's organization, as set forth in the petition (Record, fols. 16-20) and the proposed subject of the forum discussions are, as pointed out in the opinion of the New York Supreme Court, Westchester County (Record, fols. 41-55), of an essentially controversial nature.

In *Matter of Stanton* v. *Board of Education, City of New York,* 190 Misc. 1012, the Court, in denying an application to review the determination of the Board refusing to adopt a resolution providing that the use of school buildings be denied to certain subversive and illegal groups, said, at page 1016, "the law is well established that courts will not interfere with the exercise of discretion entrusted by law to public officers or bodies unless it be clearly demonstrated that the act complained of violates a specific statute or is essentially arbitrary (*Matter of Marburg* v. *Cole,* 286 N. Y. 202, 208; *Matter of Small* v. *Moss,* 277 N. Y. 501, 507)."

The petition (Record, fols. 15-35) fails to show a clear legal right to the relief demanded. To obtain the relief sought it was incumbent upon petitioner to show a clear, absolute right to such relief.

In Re Donovan, et al., 65 N. Y. S. 2d 347 (not officially reported);

In Re Poland Milk Producers Cooperative Ass'n Inc., et al., 62 N. Y. S. 2d 794 (not officially reported);

Matter of Fahey v. *Wright*, 256 A. D. 474;
Matter of Mulry v. *Beckman*, 272 A. D. 780;
Roy v. *Board of Education*, 106 N. Y. S. 2d 451 (not officially reported).

III.

The rights guaranteed by the First and Fourteenth Amendments are subordinate to the greater rights of the general public interest.

In refusing to grant petitioner's organization permission to use a school for a forum on Peace and War the respondents have determined that the general public interest will best be served by not permitting such use. The rights guaranteed by the First and Fourteenth Amendments are subordinate to the greater rights of the general public and to the right of the government to maintain and protect itself.

Marshall v. *Unied States*, 176 Fed. Rep. 473;
U. S. Painters Local Union 481, 79 F. Supp. 516;
Kiyaski Omato v. *United States*, 152 F. 2d 905;
Matter of Stanton v. *Board of Education, City of New York*, 190 Misc. 1012;
Whitney v. *People State of California*, 274 U. S. 357;
Chaplinsky v. *New Hampshire*, 315 U. S. 568.

IV.

This proceeding does not present a substantial Federal question which should be reviewed by this Court.

There is no substance to the claim that the refusal of respondents to grant petitioner's organization permission to use a school for a forum on Peace and War is an unconstitutional restraint on free speech. The petition for a writ of certiorari should be denied for want of a substantial Federal question.

Halvajian v. *Board of Education of City of Inglewood*, 341 U. S. 913;
Lyon v. *Compton Union High School*, 341 U. S. 913.

V.

Conclusion.

The petition for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

On a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Department.

BRIEF OF RESPONDENTS

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IN THE

Supreme Court of the United States

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No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

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against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

On a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Department.

BRIEF OF RESPONDENTS

Opinions of the Courts Below.

The opinion and order of the Supreme Court, Westchester County appear at pages 3, 4, 14 to 19 of the Record. The opinion is reported in 118 N. Y. S. 2d 815 and is not officially reported. The opinion of the Appellate Division of the Supreme Court, Second Department, is reported in 281 App. Div. 987.

Statement of Judicial Proceedings in New York Courts.

This proceeding was instituted by petitioner, on or about the 9th day of December, 1952, for an order, pursuant

to Article 78 of the New York Civil Practice Act, directing the respondents to grant to the petitioner's organization the use of a schoolhouse in Yonkers for the purpose of a forum for the discussion of peace and war. In the petition to the Supreme Court of the State of New York, County of Westchester (R., fols. 15-35), petitioner alleges that he is president of the Yonkers Committee for Peace, an unincorporated association, formed among residents of the City of Yonkers and of Westchester County for the object of arranging forums for the discussion of problems relating to peace against war (R., fols. 16-20); that on May 14th, 1952 (R., fol. 22) and on October 21st, 1952 (R., fol. 28) he made application to the respondents for permission to use the auditorium of one of the schools for the purpose of a forum for the discussion of peace and war and that the respondents denied such permission (R., fols. 23-29). In paragraph 2 of the petition (R., fols. 16-21) a statement of the purposes of petitioner's organization is set forth. Petitioner further alleges that respondents did not inform him of the reason for the denial of his application (R., fol. 32); that respondents are concealing a design to discriminate against him and his organization and that the acts of respondents are arbitrary and unreasonable (R., fol. 33) and violate the right of petitioner and constituent members of his organization of freedom of speech and assembly guaranteed by the Constitution of the United States and deny them the equal protection of the laws in violation of the Constitution of the United States (R., fol. 34).

Respondents, pursuant to the provisions of section 1293 of the New York Civil Practice Act, moved to dismiss the petition as a matter of law upon the ground that the petition is insufficient in law in that it does not state facts to constitute grounds for the relief sought therein; that the petition fails to show a clear legal right of petitioner to the relief demanded or to any relief on the merits; that

the petition does not state facts to establish that the respondents failed to perform a duty specifically enjoined upon them by law, and that the refusal of respondents to grant permission to petitioner's organization could be adequately reviewed by an appeal to the Commissioner of Education of the State of New York (R., fols. 36-39).

After argument at a Special Term of the Supreme Court of the State of New York, the Court denied the application and dismissed the petition on the ground that the procedure under Article 78 of the Civil Practice Act was not available to petitioner and that the exclusive remedy was by an appeal to the Commissioner of Education. The opinion of the Court is set forth in full at pages 14-19 of the Record.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, the Court unanimously affirmed the order of the Court below and held that the proceeding was properly before the Court but that the petition did not allege facts which established a clear legal right to the relief sought nor which established that respondents failed to perform a duty enjoined by law (*In the Matter of James R. Ellis, as President of the Yonkers Committee for Peace, an Unincorporated Association, Appellant* against *William Dixon, et al., as Members of the Board of Education of the City of Yonkers, Respondents*, 281 App. Div. 987).

A motion for leave to appeal to the Court of Appeals was denied by the Appellate Division of the Supreme Court of the State of New York, Second Department (R., fols. 58-62), and by the Court of Appeals (R., fols. 64-67).

Question Presented.

Does the exercise of the discretion vested in them under the provisions of section 414 of the Education Law of the State of New York by respondents in refusing to grant petitioner and his organization the right to use a school

auditorium for the purpose of holding a forum for the discussion of war and peace abridge petitioner's freedom of assembly and freedom of speech in contravention to the First and Fourteenth Amendments to the Constitution of the United States?

ARGUMENT

POINT I.

Acts of a Board of Education in granting or refusing to grant permission for the use of a schoolhouse out of hours are discretionary.

Section 414 of the Education Law of the State of New York which is set forth in full in Appendix B, pages 39-41 of petitioner's brief, vests in the trustees or board of education of a school district the discretionary power to permit the use of a schoolhouse and grounds outside of school hours for any of the purposes set forth in said section.

As pointed out by the Court at Special Term (R., fols. 44-48) such power is discretionary and the courts will not interfere with this discretion unless the action of the board is essentially arbitrary.

A member of a board of education is a public officer and must reside in the school district in which he serves. Upon removal from the district his office becomes vacant (Section 2112 of the Education Law of the State of New York). Without doubt members of a board in a school district know the sentiment of the taxpayers and voters of the school district in which they serve and, as pointed out by the Court (R., fols. 45-46), may find, even if the proposed use is in itself legitimate, that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request, the granting of which would result in dissatisfaction and criticism (*Matter of*

Women's Civic Club of Katonah, Inc., 32 State Dept. Rep. 396, 397; *Matter of Vernon High School Alumni Association*, 15 State Dept. Rep. 476; *Appeal of American Civil Liberties Union*, 36 State Dept. Rep. 476). See also *Cannon* v. *Towner*, 188 Misc. 955.

It cannot be assumed that the respondents have been arbitrary in denying the use of the school to petitioner's organization. On the contrary it must be assumed that they acted honestly and in accordance with law (*Matter of Magnotta* v. *Gerlach*, 301 N. Y. 143, 149).

The exercise of the discretion vested in respondents by section 414 of the Education Law did not abridge petitioner's freedom of assembly and freedom of speech in contravention to the First and Fourteenth Amendments to the Constitution of the United States.

POINT II.

Respondents were not required to serve and file an answer to the petition.

At page 9 of petitioner's brief it is stated that "The respondents did not file an answer as required by Section 1291, Civil Practice Act of New York, and therefore the allegations of the petition must be deemed admitted (Section 1291)."

Apparently petitioner overlooked the provisions of Section 1293 of the Civil Practice Act which provides that a respondent may apply on the return day for an order dismissing the petition as a matter of law. This is the procedure followed by the respondents in this proceeding. For the purposes of such a cross motion to dismiss all the allegations of the petition are deemed to be true (*High* v. *Board of Education*, 169 Misc. 98, aff'd 256 App. Div. 1074, aff'd 281 N. Y. 815).

Section 1293 provides that "In the event of the denial of such application, the court may permit the respondent

to answer, upon such terms as may be just" (*Matter of Friedman* v. *Roseth Corporation, et al.*, 271 App. Div. 870).

In paragraph 15 of the petition (R., fols. 30-31) petitioner alleges that the respondents and their predecessors, as members of the Board of Education of the City of Yonkers "adopted regulations for the use of schoolhouses, grounds or other property when not in use for school purposes whereby organizations at all times herein mentioned were and are permitted the use of school buildings when not in use." Nowhere in the petition is the name of any organization to whom such permission was granted set forth. The records relating to the issuance of such permits are public records and could have been inspected by petitioner. In the following paragraph of the petition (R., fols. 31-32) petitioner alleges that "the school buildings, grounds and property of and in the City of Yonkers have on numerous occasions * * * been permitted to be used pursuant to Section 414 of the Education Law by organizations for the purpose of public assembly and discussion". Such an allegation, it is respectfully submitted, is a conclusion and may not be held, even if deemed admitted by respondents' failure to answer the petition, to show that, in denying petitioner's organization the use of a school building, respondents were arbitrary or to show that there has been discrimination against petitioner's organization.

Had the Court in this proceeding denied respondents' cross motion to dismiss the petition as a matter of law it could have granted leave to the respondents to answer the petition in which event proper denials and affirmative defenses setting forth the specific reasons why they refused to grant to the petitioner's organization the use of a school building for a forum for the discussion of peace and war could have been interposed by respondents. Such answer could properly set forth the names of all organizations who have been granted permission to use schoolhouses and school grounds and the purposes for which they were used.

A question of fact would thus be raised and the Court could, upon proper proof, determine whether respondents, in refusing to grant petitioner and his organization the right to use a school auditorium for the purpose of holding a forum for the discussion of war and peace, abridged petitioner's freedom of assembly and freedom of speech in contravention to the First and Fourteenth Amendments of the Constitution of the United States, and whether petitioner's organization has been discriminated against.

POINT III.

Petition does not state facts to establish that respondents have failed to perform a duty specifically enjoined by law and does not show a clear legal right of petitioner to the relief demanded.

The Appellate Division, in affirming the order of Special Term, held that the petition does not allege facts which establish a clear legal right to the relief sought nor which establish that respondents failed to perform a duty enjoined by law (Appendix A, p. 39, of petitioner's brief).

To compel the issuance of a permit for the use of school property petitioner must show that the duty of respondents to issue such permit is positive and not discretionary.

> *Matter of Burr* v. *Voorhis,* 229 N. Y. 382;
> *Matter of Colonial Beacon Oil Co., Inc.* v. *Finn,* 245 App. Div. 382.

It is likewise incumbent on petitioner to show that he has a clear legal right to the relief sought in a proceeding under Article 78 of the New York Civil Practice Act.

> ***In re Donovan, et al.,*** 65 N. Y. S. 2d 437 (not officially reported);
> ***In re Poland Milk Producers Cooperative Ass'n., Inc., et al.,*** 62 N. Y. S. 2d 794 (not officially reported);

Matter of Fahey v. *Wright*, 256 App. Div. 474;
Matter of Mulry v. *Beckman*, 272 App. Div. 780;
Roy v. *Board of Education*, 106 N. Y. S. 2d 451 (not officially reported).

Mandamus cannot be used to compel or control a duty by an officer in the discharge of which, by law, he is given discretion.

Hubert Work, Secretary of Interior v. *United State on the Relation of Logan Rives*, 267 U. S. 175;
Hubert Work, Secretary of Interior v. *United States, ex rel., Chestatee Pyrites & Chemical Corporation*, 267 U. S. 185.

Conclusion.

The order below should be affirmed or, if reversed, this Court, it is respectfully submitted, should remand the proceeding to the Court below to make an order denying respondents' motion to dismiss the petition as a matter of law with leave to the respondents to answer, upon such terms as may be just.

Respectfully submitted,

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Of Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

BRIEF, *AMICUS CURIAE*, BY THE CITY OF NEW YORK ON BEHALF OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK.

October 6, 1954

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Preliminary Statement

The City of New York, a political subdivision of the State of New York, by its responsible and authorized law officer, the Corporation Counsel of The City of New York, sponsors this brief on behalf of the Board of Education of the City of New York. *Rules of the Supreme Court, Rule 42, subd. 4; New York City Charter, § 394.*

The Question Presented

The question presented is whether, pursuant to New York statutes and the practice followed thereunder, the use of public school buildings may be granted or withheld from individuals or groups, in the discretion of the local educational authorities without violating the applicant's freedom of speech and assembly.

The petitioner on behalf of his association had twice requested the use of a school auditorium in the City of Yonkers for the purpose of "arranging forums for the discussion of problems relating to peace against war." The Yonkers Board of Education denied these requests. The appellant contends that school buildings under certain conditions are in the same category as the public streets and accordingly the refusals of the Board were violative of the right of free speech guaranteed by the Federal Constitution.

In sustaining denials of the Yonkers board, the courts of New York State found that the petitioner had no clear legal right to the use of school buildings for public discussions and further found that the Yonkers Board of Education exercised its statutory discretion in a valid, proper and reasonable manner.

The Interest of the Amicus

The educational affairs of the City of New York are under the general management and control of the Board of Education of the City of New York. Pursuant to Education Law § 414 (Cons. Laws, Chap. 16), the governing boards of each school district within the State including the cities of New York and Yonkers are vested with discretion to grant or to refuse permission for the use of school buildings for certain specified purposes after regular school hours.

The Board of Education of the City of New York controls approximately 850 school buildings. Accordingly, it is vitally concerned in sustaining the decisions of the New York State courts as well as the long established

policy of the State Commissioner of Education, the chief administrative officer in educational affairs, which have recognized the right of local educational authorities pursuant to the statute to grant or withhold permission to use school buildings.

Summary of Argument

I

Education Law § 414 and the regulations adopted thereunder by respondents do not abridge freedom of speech or assembly. Under New York law public schools are not in the same category as streets and parks. The use of school buildings for other than the primary purpose of the education of children is a matter which may be constitutionally delegated to the discretion of local school authorities.

1. **Role of the State Commissioner of Education.**
2. **The constitutional rights of freedom of speech and assembly do not require that petitioner be granted use of school buildings.**

II

It would be inappropriate for this Court to pass upon the question of whether the regulations are unconstitutionally vague since this issue should in the first instance be reviewed by the Commissioner of Education. It would be equally inappropriate for this Court to pass upon the validity of the law and its implementing regulations since they have not been interpreted by the New York courts.

1. **The regulations are properly subject to review by the State Commissioner of Education.**
2. **The courts of New York State have not ruled on the validity of the statute and of the regulations.**

POINT I

Education Law § 414 and the regulations adopted thereunder by respondents do not abridge freedom of speech or assembly. Under New York law public schools are not in the same category as streets and parks. The use of school buildings for other than the primary purpose of the education of children is a matter which may be constitutionally delegated to the discretion of local school authorities.

The appellant as president of the Yonkers Committee for Peace had on two occasions requested the use of school buildings for the purpose of arranging forums for the discussion of problems relating to peace against war. In each instance the application was denied.

In his petition he alleges that permission was granted to other organizations to use the school buildings for the purpose of public assembly and discussion. He does not allege however that permission had been granted where objections to such use had been filed with the Board by the petitioner's group or by any other group, or where the Board of Education could reasonably have anticipated that the proposed forum or discussion would cause dissension among the people in the particular school district (R. p. 11). Nor does the appellant contend that the schools were the only suitable halls available for the purpose of holding the proposed meeting of his association.

To determine the legality of the Board's denial it is necessary to consider Education Law § 414 which governs the use of school buildings. (printed in Appendix A of this brief, pp. 20-21)

It is manifest from this statute that the primary purpose of the New York State Legislature in maintaining public school buildings is to provide free educational institutions for the children of our state. The responsibility for the entire educational system, including the necessary school buildings, has been vested in local school boards and boards of education throughout the State (Education Law § 414).

The State Legislature, recognizing that school buildings can serve a useful secondary function, has vested in each school district the discretion to permit the use of school buildings after school hours for certain limited purposes calculated to encourage the cultural, social, civic and recreational aspects of community life. The boards are authorized to promulgate apropriate regulations to implement the purposes of the statute.

Section 414 clearly indicates that each local board of education is cloaked with the responsibility and discretion to determine whether or not the proposed use of the school building carries out the purpose of this section of the Education Law. In no sense can it be said that the State Legislature has dedicated the school buildings for general public use. It has rather created a privilege to be exercised by each local board of education.

1. Role of the State Commissioner of Education.

The New York State public school system is founded upon a mandate in the New York Constitution to the State Legislature that it maintain and support a system of free common schools, wherein all the children of the State may be educated (New York Constitution, Art. XI, § 1). The Legislature pursuant to this directive provided for a public school system and, to assure the efficient operation of these schools, created the position of Commissioner of Education. The role of the Commissioner is well defined in *Matter of Bethlehem Union Free School* v. *Wilson*, 303 N. Y. 107 (1951), wherein the Court said at p. 114:

> "As to the commissioner's authority, the Constitution of this State empowers the Legislature to 'provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated' (N. Y. Const., art. XI, § 1); the Legislature has charged the Department of Education 'with the general management and supervision of all public schools and all of the educational work of the state';

and the chief administrative officer of the Department of Education is the commissioner (N. Y. Const., art. V, §§ 2, 4; Education Law §§ 101, 301)."

In addition to being the chief administrative officer, the Commissioner is vested with certain quasi-judicial functions pursuant to which he adjudicates problems arising in the operation of the public school system, (Education Law § 310). The broad latitude of these quasi-judicial powers is apparent from the provision that the decisions of the Commissioner shall be final and conclusive and not subject to court review. The Federal courts and the courts of New York State have repeatedly held that the practical construction given to a statute by those officials who are charged with its administration is entitled to great weight. *N. L. R. B.* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131 (1944); *Rochester Telephone Corp* v. *United States*, 307 U. S. 125, 146 (1939); *Mountin & Finishing Company, Inc.* v. *McGoldrick*, 294 N. Y. 104, 108 (1945); *Bullock* v. *Cooley*, 225 N. Y. 566, 571 (1919).

In New York State the question involved in this appeal—the use of public school buildings for other than the education of children—is not a novel problem engendered by the tensions of present world conditions. The Commissioner of Education, both by administrative directive and by quasi-judicial decisions, has established certain norms for the guidance of local school boards and boards of education in considering applications for the use of school buildings. The Commissioner, in the name of University of the State of New York, has prepared and distributed a bulletin known as Law Pamphlet No. 6, dated August 2, 1948, in which under the heading Policy To Be Followed (p. 7) he advises school officials against granting the use of school buildings for a forum or discussion which is likely to arouse objection or create dissension among the local taxpayers. (For the convenience of the Court we have printed a copy of this pamphlet in Appendix A pp. 22-31).

In the exercise of his quasi-judicial functions, the Commissioner has repeatedly sustained school boards in denying permission for the use of school buildings for topics of discussion calculated to engender local dissension or objection. For example, the Commissioner has sustained the refusal of a local board to permit the holding of a dance in a school hall to which non-residents would be invited and the purpose of which was the collecting of funds toward a war memorial (*Matter of Women's Civic Club of Katonah*, 31 St. Dept. Rep. 396 [1924]); similarly he upheld the determination of a local school board that the use of the school building by a civic organization whose membership was limited to residents of one village would result in ill feeling on the part of residents of other towns in that school district (*Matter of Pelham Manor Ass'n*, 36 St. Dept. Rep. 433 [1927]); he also sustained a local board which refused permission to a rent and taxpayers association to meet on school premises (*Appeal of Mauersberger*, 50 St. Dept. Rep. 501 [1935]). In this latter decision the Commissioner restated the principle which should guide local school officials, as follows:

> "There are many factors that may be properly taken into consideration by a board of trustees in determining whether it would permit the school property to be used for other than school purposes. The board is presumed to have knowledge of local conditions and to know the sentiment of the taxpayers and voters of the district. Assuming that a use proposed is in itself legitimate, the board may still find that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request, the granting of which would result in dissatisfaction and criticism."

These same principles were followed in the comparatively tranquil period of the nineteen twenties. The Commissioner denied requests for the use of school buildings for discussions of topics admittedly controversial and which more properly belonged in the traditional forums of free

speech or in buildings available for such purposes. This ruling was enunciated in *Appeal of the American Civil Liberties Union.* 36 St. Dept. Rep. 87 (1926).

The Civil Liberties group advanced arguments strikingly similar to those urged by the present appellant. They insisted that so long as they were a civic group which allegedly fitted into the definitions of Education Law § 455 (now § 414), the Board of Education had no authority to consider the subjects proposed to be discussed at the meeting nor the identity of the speakers. Dismissing this argument, the Commissioner said:

> "The language of this section [§ 455 now § 414] clearly indicates that it was the intention of the Legislature that boards of education should control the program for Americanization as presented in these civic centers and forums, in the same manner as they control any other school activity. The Legislature never intended to throw the school buildings wide open as public forums where organizations and societies of every kind can assemble and discuss subjects of every nature."

The Commissioner's opinion sets community welfare as the true standard to be met before permission to use a school building may be granted, in the following terms:

> "* * * no matter how worthy the object or how just the cause for which the use of school buildings is sought, the use should not be granted if there is any probability that it will be resented by a considerable number of people of the district, village or city. It would be better to err on the side of exclusion than that of inclusion."
>
> * * * * *
>
> "The real question, then, is whether the use by American Civil Liberties Union of the Stuyvesant High School in the city of New York for a meeting to discuss 'Old Fashioned Free Speech' is such a use as will promote the welfare of the schools in that city, or whether it is such an activity as, like religion and politics,

should be debarred from the public schools and left to be sponsored by other institutions. Its answer involves no reflection upon the American Civil Liberties Union or any of its members. The denial of its request to use the high school building in no way impairs its right to apply for and procure other public places for exploiting its program. Undoubtedly there are many such places in the city of New York which can be had for the purpose of public discussions. The cause of free speech is in no way jeopardized by this refusal by the board of education."

The Commissioner made a similar ruling in *Matter of the Appeal of Teachers Union, Local 555 (U. P. W.)* 73 St. Dept. Rep. 41 (1952), wherein he sustained the action of the New York City Board of Education withdrawing from "Teachers Union" the privilege of holding its meetings on school premises. The Commissioner noted that many organizations and individuals had objected to the use of school buildings by this group. He ruled that the Board was not arbitrary in using this as a basis for denying the use of the school building.

From the language of the statute, as well as the long established policy and consistent interpretations of the Commissioner it is clear that the New York State Legislature had not so dedicated public school buildings for general public use so as to create a clear legal right in this appellant to use the Yonkers school buildings for its organization meetings.

A discussion of the petitioner's failure to establish a clear legal right appears in the Appellees' brief at pp. 7-8.

2. The constitutional rights of freedom of speech and assembly do not require that petitioner be granted use of school buildings.

A. The appellant, in the instant case, has conceded (App. Br. p. 14) that the State need not make public schools available for assembly and speech. He contends, however, that the State may not make school buildings available for

some public uses and not for others, without thereby violating the United States constitutional guarantees of free speech and assembly as well as due process.

In support of this position he cites a number of decisions such as *Hague* v. *C. I. O.*, 307 U. S. 496 (1939), *Jamison* v. *Texas*, 318 U. S. 413 (1943) *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), *Niemotko* v. *Maryland* 340 U. S. 268 (1950) and *Kunz* v. *New York* 340 U. S. 290 (1950) in which this Court gave judicial recognition to the traditional use of the streets for the exercise of free speech and the exchange of ideas with one's fellowmen. The appellant relies also on a California case, *Danskin* v. *San Diego Unified School District* (S. Ct., 1946), 28 Calif. (2d) 536, 171 Pacific (2d) 885, which will be discussed and distinguished *infra.*

There can be no quarrel with the contention that generally speaking municipalities cannot bar the use of the streets for the dissemination of ideas, nor with the further premise that public officials may not by the unlimited exercise of license defeat the exercise of free speech and assembly on the public thoroughfares.

The public school buildings of New York State have not been dedicated by the State Legislature to the general public use which would class them with the public highways. The permitted uses are decidedly limited to certain definite purposes as were outlined *supra.*

B. To support his contention that public school buildings are public forums for free and untrammeled exchange of ideas, the appellant relies in the main on the decision of the Supreme Court of California in *Danskin* v. *San Diego Unified School District, supra.* The situations presented in the *Danskin* and in the present case are not all analogous. The appellant completely overlooks the essential difference in the statutory scheme for the use of school buildings in New York and in California.

In the *Danskin* case the Court said at p. 888:

> "Under the Civic Center Act, Education Code, §§ 19431-19439, the governing boards of school dis-

> tricts *must* grant the free use of school auditoriums for the purposes specified in section 19431 of the Education Code, * * *." (*Italics ours.*)

This general dedication of school buildings to public use is a very broad grant and leaves no room for the exercise of discretion by the local school boards. In direct contrast the New York Legislature (Education Law § 414) has sharply curtailed the use of school property for other than the education of children. The statute defines a limited list of permissible uses, but even as to those local school boards are vested with discretion to grant or refuse the use of buildings.

In the *Danskin* case p. 888, the California Court considered the constitutionality of the Civic Center Act, Education Code § 19432, which provides:

> "Any use, by any individual, society, group, or organization which has as its object or as one of its objects, or is affiliated with any group, society, or organization which has as its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of government of the United States or of the State by force, violence, or other unlawful means shall not be granted, permitted, or suffered."

The section further provides that the governing board of a school district could require the execution of an affidavit by an applicant for the use of school property in which the applicant would be required to swear that neither he nor any member of his organization was a member of a subversive group as defined in the section.

The majority of the Court ruled that such a requirement was in violation of the United States Constitution in that it constituted an infringement on freedom of speech without the establishment of a "clear and present danger" to the State.

It is to be noted that this decision was rendered in 1946 without the benefit of the subsequent holdings of this Court in such landmark case as:

Garner v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951) in which this Court sustained the constitutionality of a statute which required employees of Los Angeles County to swear (1) that they did not belong to an organization advocating the overthrow of the United States Government by force and violence; (2) that they had not been, and were not then, members of the Communist Political Association or the Communist Party.

American Communications Ass'n, C. I. O. v. *Douds*, 339 U. S. 392 (1950) in which this Court sustained a Congressional enactment which precluded from the benefits of the National Labor Relations Board those unions whose officials did not foreswear that they were members of the Communist Party or affiliated with such party and that they did not believe in, and were not members of or supported any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. This Court ruled that a reasonable relationship existed between the evil sought to be cured by Congress and the means taken to effect this result.

Dennis v. *United States*, 241 U. S. 494 (1951) in which this Court construed the constitutionality of the Smith Act and enunciated a definition of "clear and present danger" far more inclusive than the definition evolved by the California court in the *Danskin* case. Discussing *C I. O.* v. *Douds* this Court said that when Congress foreclosed the use of the facilities of the National Labor Relations Board to any union whose officers would not take an oath that they were not members of the Communist Party and did not believe in the overthrow of the Government by force and violence, it was not punishing beliefs but was regulating union affairs.

Similarly the Yonkers Board of Education has not limited this petitioners' right of free speech but rather is

merely regulating the use of school buildings under its control.

If the *Danskin* case had been appealed this Court may very well have found that the State Legislature could deny the use of school buildings, which are concededly in a different class than the streets, to those people who have as their objective the overthrow of the United States government by force and violence as speedily as the circumstances would permit.

POINT II

It would be inappropriate for this Court to pass upon the question of whether the regulations are unconstitutionally vague since this issue should in the first instance be reviewed by the Commissioner of Education. It would be equally inappropriate for this Court to pass upon the validity of the law and its implementing regulations since they have not been interpreted by the New York courts.

1. The regulations are properly subject to review by the State Commissioner of Education.

In the courts below the petitioner confined his attack to the assertion that (1) the act of the Yonkers Board of Education denying him the use of public school buildings was part of a design to discriminate against the petitioner and his organization; (2) the denial "violates the right of petitioner and the constituent members of his organization of freedom of speech and assembly guaranteed by the Constitution of the United States and denies them the equal protection of the laws in violation of the Constitution of the United States" (R. p. 12).

It is in this Court that the petitioner for the first time attempts to attack the validity of the regulations adopted by the Board of Education of the City of Yonkers regulating the use of school buildings. Nowhere in the petition submitted to the Special Term court did the petitioner contest the validity or the reasonableness of the regulations adopted. His only allusion to such regulations was to

allege their adoption whereby the use of school property by organizations was permitted (R. pp. 10-11).

It is apparent that the petitioner's theory of law at Special Term was not that the regulations were arbitrary or unreasonable in themselves but merely that the denial of his request made thereunder was an arbitrary action.

Examination of the briefs submitted in the Appellate Division, Second Department, and on a motion for leave to appeal to the Court of Appeals, reveals that no attack on the regulations themselves was made in either of these courts.

In his brief submitted to this Court the petitioner argues for the first time, that the regulations adopted by the Yonkers Board of Education are invalid and unconstitutional in that they reserve unlimited power and discretion to the Board to grant or deny requests for use of school property. (App. Br., p. 25).

It was demonstrated in Point I that the New York State Legislature created the position of Commissioner of Education to administer the state public school system and as part of this plan the legislature utilized the Commissioner's educational experience by vesting him with quasi-judicial powers. Education Law § 310 provides that any party believing himself aggrieved by an act or omission of school authorities "*may* appeal or petition to the commissioner of education" for redress (italics ours). (For the convenience of the Court the full text of Education Law §310 is printed in Appendix A of this brief, pp. 18-19).

As to the use of school buildings for other than school purposes, the New York Legislature saw fit to reserve exclusively to the Commissioner of Education the authority in the first instance to determine whether the regulations adopted by the school board carry out the intent of the legislature. This is expressed in that portion of Education Law § 414 which reads "Such regulations shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and *shall* be subject to review on appeal to the Commissioner of Education as provided by law" (italics ours).

The proper forum for the petitioner's attack on the Yonkers Board's regulations is before the Commissioner of Education. It is improper to raise this issue for the first time in this Court.

2. The courts of New York State have not ruled on the validity of the statute and of the regulations.

Even if this Court were to find that the petitioner could have tested the reasonableness of the statute and the regulations in the State courts, in the first instance, it would be inappropriate for this Court to pass, in this appeal, upon the constitutionality of Education Law § 414 and the regulations adopted pursuant thereto by the Yonkers Board of Education since neither the section nor the regulations have been interpreted by the Court of Appeals.

As was stated *supra,* the petitioner did not challenge the statute or the regulations as being unconstitutionally vague in any of the State courts. In neither the opinions nor orders of these courts does it appear that the vagueness of Education Law § 414 and the regulations adopted thereunder by the Yonkers Board of Education were discussed.

The State courts were not required to consider or determine the constitutionality of either the statute or the regulations as an alleged violation of free speech since the petitioner did not urge that the regulations themselves were in any way invalid. He merely urged that the application of regulations, presumably valid, in denying his petition, was a discriminatory and arbitrary act.

So far as we are aware, neither the Court of Appeals nor the Appellate Divisions of New York State have ever construed the constitutionality of Education Law § 414 and the regulations adopted by various boards of education in the State in so far as they affect the right of free speech.

It has been repeatedly held by this Court that where a constitutional issue involving the interpretation of a State statute is raised before it and such statute has not been decisively construed by the State courts, the Supreme

Court will refrain from passing on such constitutional issue until the statute has been authoritatively construed by State judicial decision *Asbury Hospital* v. *Cass County* 326 U. S. 207, 213-216 (1945); *Federation of Labor* v. *McAdory,* 325 U. S. 450, 460-462, 470-471 (1945); *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 546 (1914); *St. Louis S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350, 368-371 (1914); *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285, 293-294 (1935); *Minnesota* v. *Probate Court,* 309 U. S. 270, 276-277 (1940); Cf. *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 186-187 (1932); *Stephenson* v. *Binford,* 287 U. S. 251, 276-277 (1932).

In *Federation of Labor* v. *McAdory, supra,* wherein certain labor unions brought an action in the Alabama Courts for a declaratory judgment establishing the unconstitutionality of an Alabama statute regulating labor unions, this Court unanimously refused to pass upon the constitutionality of certain provisions of the act which were attacked as void for vagueness. The ground for this ruling was that such provisions had not been authoritatively construed by the State courts and that no application of the statute to a specific set of circumstances was involved. Further explaining its refusal to pass upon the constitutionality of the act, this Court observed (p. 471):

> "In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes."

Should this Court now undertake to pass upon the validity of Education Law § 414 as implemented by the regulations as allegedly abridging free speech, there would have been no prior opportunity for the New York courts to pass upon this claim of unconstitutionality. See for example, *Fox* v. *Washington,* 236 U. S. 273 (1915) wherein the construction given a penal statute by the highest State court was held to overcome the objection of vagueness. Cf. *Winters* v. *New York,* 333 U. S. 507 (1948).

CONCLUSION

The Courts below properly ruled that this petitioner had no clear legal right to the use of school buildings. If any question exists as to the vagueness of the regulations adopted by the Yonkers Board of Education, the petitioner has available to him an appeal to the Commissioner of Education of the State of New York. Accordingly, the order appealed from should be affirmed and this appeal dismissed.

New York, October 6, 1954.

Respectfully submitted,

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APPENDIX A

CONSOLIDATED LAWS OF THE STATE OF NEW YORK

CHAPTER 16

EDUCATION LAW § 310

Appeals or petitions to commissioner of education and other proceedings

Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

EDUCATION LAW § 414

Use of schoolhouse and grounds out of school hours

Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, when not in use for school purposes, for such other public purposes as are herein provided. Such regulations shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes, for any of the following purposes:

1. For the purpose of instruction in any branch of education, learning or the arts.

2. For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

3. For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be nonexclusive and shall be open to the general public.

4. For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings,

entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firemen.

5. For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no political meetings shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

6. For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be nonexclusive and open to the general public.

BULLETIN OF THE UNIVERSITY OF THE STATE OF NEW YORK

(Published August 2, 1948)

Law Pamphlet 6

USE OF SCHOOL BUILDINGS

USE OF SCHOOL BUILDINGS

The Law

Primarily the use of school buildings out of school hours is governed by section 414 of the Education Law and section 4 of article XI of the New York State Constitution, which follow:

Education Law, § 414

§ 414 **Use of schoolhouse and grounds out of school hours.**

Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, when not in use for school purposes, for such other public purposes as are herein provided. Such regulations shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes, for any of the following purposes:

1 For the purpose of instruction in any branch of education, learning or the arts.

2 For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

3 For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

4 For meetings, entertainments and ocasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firemen.

5 For polling places for holding primaries and elections and for the registration of voters, and for holding political meetings. But no political meetings shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

6 For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or

city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

Constitution, art. XI

§ 4 Use of public property or money in aid of denominational schools prohibited. . . . Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. . . .

AUTHORITY OF SCHOOL OFFICIALS

The trustee or board of trustees of a common school district and the board of education of a union free, central or city school district have sole authority to prescribe policies with respect to the use of school buildings. Under the present statute no association or organization is entitled *as a matter of right* to use the school building without the express permission of the board of education, and while the administration of the use of the school building is sometimes delegated to the superintendent of schools, principal or other agent, fundamentally the responsibility for its use is vested in the board of education or board of trustees.

Rental of School Buildings

The school district is created for the purpose of giving instruction to school children. The powers of boards of education are prescribed by statute, and boards may not exceed the powers specifically granted them. There is no power given to a board to become a landlord and rent its property except as stated below. The board may not legally divest itself of control over the school property and it is responsible at all times for its proper use. A lease evidently would restrict the board as to power of entry and otherwise and is consequently not possible under the present statute. This does not mean, however, that a board may not require organizations which are given the privilege of the use of the building to recompense the school district for expenses incurred. All organizations receive the use of the building only upon terms prescribed by the board and it may exact fees, irrespective of the purposes of the organization or the use to which the building is to be put. This charge is not a rental in any sense and is nothing more than a fee or reimbursement, as indicated, for expenses incurred in lighting, heating, janitor service etc.

The only exception from this rule is authorized by Laws of 1948, chapter 681, which amends section 402, subdivision 2, of the Education Law so as to allow leasing of school buildings in whole or in part, for residential purposes only, for one-year periods, where the school has been closed and during the five years necessary prior to its sale.

Insurance

Section 1604, subdivision 6, and section 1709, subdivision 8, require boards of education to carry fire insurance upon all school property. Failure of a board to carry proper insurance may give rise to possible personal liability for loss, and certainly much unfavorable criticism. When a board permits an organization to use the building, care must be exercised that the insurance policy is in

force and effect during such occasions and that the school district is properly protected at all times.

Use of the School Building in General

As indicated heretofore, the board of education has absolute discretion in refusing a use requested and in prescribing terms if the use is allowed. Its act in permitting or refusing organizations the use is reviewable upon appeal to the Commissioner of Education under section 310 of the Education Law. The law does prohibit the board from permitting uses for certain purposes such as religious, fraternal etc. The board, under section 414 ante, may not permit an organization to use the building if admission fees are to be charged, unless the proceeds, after deducting the actual expenses of the meetings, are to be devoted to an educational or charitable purpose. The statute makes two exceptions with respect to this matter. Veterans' organizations and organizations of volunteer firemen may be granted the use of the building even though the admission fees may be devoted to the use of these organizations.

Use for Political Purposes

Subdivision 5 of section 414 of the Education Law authorizes the use of a school building for a polling place for holding primaries and elections and for the registration of voters and for holding political meetings. No such use, however, may be permitted unless authorized by a vote at a district meeting, except that in cities the discretion is vested in the board of education.

Use for Fraternal and Religious Purposes

The various provisions of the State Constitution and the Education Law heretofore quoted prohibit the use of a school building for fraternal purposes or by organizations under the control of a religious denomination for religious instruction.

From time to time questions in relation to reading the Bible in school have come to the attention of this Depart-

ment. The following decision relates to religious instruction in the public schools:

No. 4860. Appeal of Doris L. McLennan, against District No. 1, Town of Geddes, Onondaga county; 65 St. Dept. 56

The record in this case shows that the public school children in the above-named school district were separated into two religious groups, and at 11 o'clock in the morning on each Tuesday and for the ensuing 45 minutes, in the school building, religious instruction was given to them.

Appellant does not desire that her child participate in religious instruction in the school building. Following her objection, the child was excused by the board of trustees but he was required to spend his time in the principal's office while instruction was being carried on in the school building in religion for the other pupils. Appellant objects to the use of the school building for the purpose of religious instruction. Her position is in accordance with the State Constitution and the statute and rules.

The use of a school building for religious instruction is prohibited by section 4 of article XI of the State Constitution.

Under the provisions of section 625, subdivision 2 of paragraph B, as amended by chapter 305 of the Laws of 1940, "Absence for religious observance and education shall be permitted under rules that the Commissioner shall establish."

Following the enactment of the above statute such rules were established by the Commissioner of Education and approved by the Regents on June 20, 1940. Rule number 1 provides:

> Absence of a pupil from school during school hours for religious observance and education to be had *outside the school building and grounds* will be excused upon the request in writing signed by the parent or guardian of the pupil.

It is clear, therefore, that under the provisions of the statute, any parent who desires that his child be excused for religious instruction may apply for an excuse for such

purpose following this rule. The instruction must be carried on outside of the school building, however.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the Board of Trustees of this school district refrain from carrying on religious instruction within the school building. The board will, however, be expected to make arrangements for excusing those pupils whose parents request the same for religious instruction elsewhere within the rules provided.

IN WITNESS WHEREOF, I, George D. Stoddard, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 24th day of April 1943.

[SEAL]

GEORGE D. STODDARD
Commissioner of Education

POLICY TO BE FOLLOWED

The following is a more recent decision of the Commissioner of Education upon an appeal regularly taken which discusses the use of school buildings and lays down many fundamental principles which boards of education and trustees will be justified in following:

IN THE MATTER
of the

Appeal of Oscar Mauersberger relative to action taken by the board of education of Union Free School District No. 6, of the town of Colonie, in failing and refusing to allow the use of the school auditorium for community meetings.

Decided by the Commissioner of Education, May 2, 1935

Oscar Mauersberger, a resident and taxpayer of Common School District No. 6 of the town of Colonie, county

of Albany, brings this appeal from the refusal of the board of trustees of such district to permit an organization, which the appellant calls the "Maywood Rent and Taxpayers Association in the Town of Colonie," the use of the school building for meeting purposes.

The use of school buildings outside of school hours is controlled by the provisions of section 455 of the Education Law, and under a long line of prior decisions it has been repeatedly held that the right to use the school building is within the discretion of the trustees or board of education, subject to the limitations prescribed for such use under such section. (*See Matter of District No. 4, Brighton, 32 State Dep't Rep't 319*). The board of trustees is not, however, bound by this statute to grant the use of school property even where such use falls within one of the permitted classifications. The board may exercise its discretion in determining whether or not any requested use for one or more of the purposes mentioned in the statute shall be granted. (*Matter of the Pelham Manor Association, 36 State Dep't Rep't 433*). It is only when the board has abused its discretion that its action may be reversed on appeal. (*Matter of Women's Civic Club of Katonah, Inc., 31 State Dep't Rep't 396, 397; also Matter of Vernon High School Alumni Association, 15 State Dep't Rep't 476*).

There are many factors that may be properly taken into consideration by a board of trustees in determining whether it would permit the school property to be used for other than school purposes. The board is presumed to have knowledge of local conditions and to know the sentiment of the taxpayers and voters of the district. Assuming that a use proposed is in itself legitimate, the board may still feel that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request, the granting of which would result in dissatisfaction and criticism. (*Matter of Women's Civic Club of Katonah ante*).

Appellant avers that membership in the Maywood Rent and Taxpayers Association is open to any taxpayer or rent

payer living in Common School District No. 6 of the town of Colonie, county of Albany; that the meetings of said association are nonexclusive and are open to the public at large, except that it is necessary in order to belong to this organization that certain monthly dues be paid. As these dues, however, are nominal I do not think that such requirement of the by-laws is sufficient to make this organization an exclusive organization within the meaning of said section 455. The apellant, in commenting upon the purposes for which this organization is founded, declared it is not in any manner limited to matters relating to the school of the district or to the activities of the school board. Apparently any subject may be presented.

Where it has been determined by the board of education that the use of a building by an organization would arouse dissension in the community, it has never been my policy to interfere. I quote from Matter of Appeal of American Civil Liberties Union, 36 State Dep't Rep't 87, as follows:

> Schools are established and maintained for a definite and specific purpose, to wit, the secular education of the youth of the State, and any activity within the scope of that purpose or tending to promote the welfare of the schools and the community should be allowed and encouraged. On the other hand, any activity which is not embraced in the general school program and which is of a controversial nature liable to arouse ill feeling, jealousy or dissension, or to lead to misunderstanding, should be rigidly debarred. By pursuing this policy in the past our public schools have maintained the confidence and respect of all elements, classes, creeds and factions. The public schools are supported by the whole body of citizens; within their walls assemble the children of the rich and the poor, the children of parents of every shade of religious belief or unbelief. The children of almost every race and color. Therefore, nothing that will tend to foster intolerance, bigotry, animosity or dissension should be

allowed to inject itself into the public school system of this great State.

The board of trustees of this district defends its action on the ground that it is of the opinion that the use of this building by this organization would not be conducive to the welfare and well-being of the school district; it alleges, that its meetings serve for discussions of subjects which are of a highly controversial nature, few of which touch on matters affecting the school district; that some of its personnel are in the organization merely to vent personal grudges; that its roster of members is not representative of the rank a e of the district taxpayers. The board apparently bases these findings of facts upon prior meetings of this association. Where a board of trustees being familiar with local conditions feels that a contemplated use of a building is inimical to the best interests of the school district, I am loath to interfere.

Nevertheless where an organization composed of taxpayers of a school district wishes to use the building for a legitimate purpose, a board should not arbitrarily and capriciously refuse such use. I think the appellant, as president of the organization, may properly petition this board of trustees for the use of the school building for a meeting of this organization and in such petition he may specify the particular subjects and the matters to be discussed thereat. If on such presentation the president of the association can convince the board of trustees that the purposes to be discussed at a given meeting are not controversial and will be for the welfare of the community rather than for the purpose of promoting dissension, this board of trustees will undoubtedly, in the exercise of its discretion, permit the use requested.

The Appeal is Dismissed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

SUPPLEMENTAL BRIEF, *AMICUS CURIAE,* BY THE CITY OF NEW YORK ON BEHALF OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK.

This Court has Placed Public School Buildings in a Category Different from Public Streets or Parks.

An examination of the decisions of this Court in *Zorach* v. *Clauson*, 343 U. S. 306 (1952) and *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) shows very clearly that where school buildings are used for religious purposes the rule of law applied differs from the rule invoked where

[34619]

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April 18, 1955

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public streets and parks were used for religious purposes as in *Kunz* v. *New York*, 340 U. S. 290 (1951), and *Niemotko* v. *Maryland*, 340 U. S. 268 (1951).

In the *McCollum* case, *supra*, this Court held violative of the First Amendment a religious instruction program in which pupils were released from part of their secular program on condition that they attend religious instruction classes given in public school classrooms by teachers not paid by the local education board. The program was ruled invalid in that (1) the State's tax-supported public school buildings were used for the dissemination of religious doctrines; and (2) the State afforded sectarian groups an invaluable aid in that it helped to provide pupils for religious instruction through the machinery of the State's compulsory school attendance laws.

This Court in *Zorach* v. *Clauson*, *supra*, determined that the released time program of the New York City Board of Education did not violate the Constitution since public school classrooms were not used for religious instruction, nor was the public school system used directly to promote such instruction.

Mr. Justice FRANKFURTER in his concurring opinion in *McCollum* v. *Board of Education*, *supra*, traced the history and purpose of the public school system in the United States and stated in part (pp. 216-217):

> "The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."

School buildings of necessity are identified with the school system, especially in the minds of the school children and their parents. The New York State Commissioner of

Education, in his quasi judicial decisions involving the use of school buildings, has sought to give effect to the concept that schools and school buildings should have a true academic atmosphere. They should not be the center of divisive conflicts in the community. (The Court is respectfully referred to pp. 7-9 of the *amicus* brief for rulings by the Commissioner.)

The constitutional rights of a religious group are not violated by denying them the use of a public school building for the purpose of conducting a religious service or discussion. On the contrary, under the decision in the *McCollum* case, *supra*, the school authorities would be violating the Constitution if such a use were permitted. Yet these same people could utiiize a public street or park to conduct a discussion calculated to convert others to their religious point of view. *Kunz* v. *New York* and *Niemotko* v. *Maryland*, *supra*.

In view of the foregoing, public school buildings cannot be deemed to be among the traditional forums available for the exercise of freedom of speech and religion. Accordingly, the petitioner's rights of freedom of speech and assembly are not violated by a refusal to permit the petitioner to use a school building.

The Question of Whether the Regulations of the Yonkers Board of Education are Unconstitutionally Vague is not Properly Before This Court.

(1)

The petitioner predicates his argument on the theory that the same rights for the exercise of freedom of speech and assembly attach to school buildings as to streets and parks (Brief of petitioner, p. 14). If the petitioner's premise is unsound, as we contend, then it would appear to be unnecessary for this Court to consider whether or not it may examine into the regulations governing the use of school buildings promulgated by the Yonkers Board of Education.

(2)

In any event, we demonstrated in the main *amicus curiae* brief submitted on behalf of the New York City Board of Education that this petitioner did not challenge the regulations of the Yonkers Board in any of the New York State courts (p. 14, *Amicus* Brief). The record and the briefs are barren of any indication that the New York courts were asked to consider the question of whether the regulations were illegally vague. It is equally clear that the courts did not consider the regulations in reaching their determinations.

If this Court rules that the petitioner has a constitutional right to use school buildings for free speech and assembly, the New York courts should be given the opportunity to determine whether the petitioner must, by virtue of Education Law § 414, address a challenge as to the unconstitutionality of the regulations of the Yonkers Board to the New York State Commissioner of Education. (The Court is respectfully referred to p. 14 Brief of the *Amicus* for the discussion on this point.)

On oral argument questions were asked by this Court as to the finality of the determinations of the New York State Commissioner of Education. The petitioner in his supplemental brief on reargument has stated (p. 7) "If the petitioner had appealed to the Commissioner then by reason of the text of Section 310, Education Law and by construction, *Chapin* v. *Board of Education*, 291 N. Y. 241, he would have been barred from appeal to the Courts." In view of the foregoing, a brief discussion of this aspect of the case seems essential.

Education Law § 310 states that "any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; * * * and his decisions in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever." (The full text of the statute is cited at pp. 18-19 of the *Amicus* Brief.)

The New York State courts have interpreted this section to mean that a person may in the first instance seek a review either before the Commissioner of Education or the courts. A petitioner may not however seek a *de novo* review before both. If the petitioner herein goes to the Commissioner, the courts will be available for a review to determine whether or not the Commissioner was arbitrary or capricious in his ruling.

The law is well stated in *Matter of Ross* v. *Wilson*, 284 App. Div. 522 (3rd Dept., 1954), at 526-7:

> "Instead of resorting to the courts in the first instance, the petitioners chose to appeal to the Commissioner of Education, as they had the right to do under the Education Law. Having appealed to him, they must accept his decision as conclusive (*Barringer* v. *Powell*, 230 N. Y. 37; *Matter of Chapin* v. *Board of Educ.*, 291 N. Y. 241).
>
> It should be borne in mind that this proceeding is brought to review the commissioner's decision upon the appeal taken by the petitioner to the commissioner, not to determine *de novo* the propriety of the action of the Board of Education or of the voters of the district. There can be no question as to the applicability of the finality rule to this proceeding. Under its plain terms, section 310 of the Education Law is applicable to the review of any decision made by the commissioner upon an appeal to him from the action of a school district meeting or from an official act or decision of school authorities.
>
> Our only power, under the circumstances, is to determine whether there was a reasonable basis for the commissioner's interpretation of the statute, so that it cannot be stigmatized as purely arbitrary or wholly lacking in rationality. We accordingly analyze the conflicting interpretations advanced by the parties, with that end in view."

The case of *Matter of Chapin* v. *Board of Education*, 291 N. Y. 241 (1943), cited by the petitioner to support his contention that he would be barred from the courts if he

appealed to the Commissioner, stands only for the proposition that the petitioner could not seek a *de novo* hearing in the Courts if he first went to the Commissioner. The right to review the action of the Commissioner for arbitrariness is clear. The Court said at p. 244:

> "Section 890 of the Education Law makes 'final and conclusive, and not subject to question or review in any place or court whatever', a decision of the Commissioner of Education on an 'appeal' to him in a controversy such as this. Similar provisions have been in the statutes since 1822 (see chapter 256 of the laws of that year). Since the Commissioner's determination of this controversy is not shown to have been 'purely arbitrary', it was and is final and binding on petitioner and his colleagues. (*Matter of Levitch* v. *Board of Education*, 243 N. Y. 373.)"

The foregoing comments apply generally to a review of actions of boards of education under § 310 of the Education Law. Since the dispute here involved concerns a regulation of the Yonkers Board, we argued in our main brief (p. 14) that Education Law, § 414, required the petitioner to bring his appeal in the first instance to the Commissioner. In the event that the New York Courts so construe Education Law § 414 the petitioner would still have available to him a review in the Court as to whether the Commissioner's determination was arbitrary. Obviously if the Commissioner were to hold valid regulations patently unconstitutionally vague the New York Courts would hold his determination arbitrary.

CONCLUSION

The Courts below properly ruled that this petitioner had no clear legal right to the use of school buildings. If any question exists as to the vagueness of the regulations adopted by the Yonkers Board of Education, the petitioner has available to him an appeal to the Commissioner of Education of the State of New York. Accordingly, the order appealed from should be affirmed and this appeal dismissed.

New York, April 18, 1955.

Respectfully submitted,

PETER CAMPBELL BROWN,
Corporation Counsel of the City of New York.

LEO A. LARKIN,
SEYMOUR B. QUEL,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

BRIEF OF *AMICUS CURIAE* ON APPELLATE PRACTICE OF THE NEW YORK COURT OF APPEALS ON CONSTITUTIONAL QUESTIONS.

April 22, 1955

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During the reargument of the instant appeal, questions were asked by the Court as to whether the petitioner had exhausted his remedy in the state courts before invoking the jurisdiction of this Court. We received permission to file a supplemental brief dealing with that question.

This proceeding was instituted by the petitioner in the Supreme Court, Westchester County, in a proceeding

under article 78 of the New York Civil Practice Act. The relief sought by the petitioner was an order directing the Yonkers School Board to permit the use of its school building for the meeting in question.

The Petitioner's application was denied by the Supreme Court, Westchester County. The petitioner appealed to the Appellate Division of the Supreme Court, Second Department, which affirmed the denial of the order and denied leave to appeal to the Court of Appeals. Thereafter the petitioner applied to the Court of Appeals for permission to appeal from the order of theAppellate Division. The Court of Appeals denied the petitioner's application without specifying the grounds of such denial, and the petitioner thereafter invoked the jurisdiction of this Court.

An appeal may be taken to the Court of Appeals as a matter of right from a final determination of the Appellate Division, where a constitutional question is directly involved. Where an appeal may be taken as a matter of right, the Court of Appeals lacks jurisdiction to grant leave to appeal.

New York Civil Practice Act, § 588, subd. 1(a), specifically provides for the appeal as of right on constitutional questions as follows:

> "§ 588. Appeal as of Right. Appeal to the court of appeals as of right lies only
>
> "1. from a judgment or order of the appellate division, provided that the judgment finally determine a special proceeding, and provided further that
>
> "(a) there be directly involved the construction of the constitution of the state or of the United States; * * *."

In order to take an appeal as of right, it is not necessary that the one seeking to appeal show that he must succeed on the appeal. In *Matter of Davega-City Radio* v.

Labor Board, 281 N. Y. 13 (1939), the Court of Appeals said (p. 19):

> "The appeal to this court is taken as of right on the ground that a substantial constitutional question is involved, as will presently appear. The fact that we decide the constitutional question against appellant does not make it the less a ground for appeal. No appellant should be required to insure that his answer to the constitutional question will be adopted by the court."

The provision dealing with appeals by permission specifically provides that such permission may not be obtained where a case is appealable as of right on constitutional grounds. Civil Practice Act, § 589 reads as follows:

> "§ 589. APPEAL BY PERMISSION. Appeal to the court of appeals by premission lies only
>
> • • • • •
>
> "3. either
>
> "(a) by permission of the appellate division granted before application to the court of appeals for permission to appeal, and in case of refusal of such permission, by permission of the court of appeals, or
>
> "(b) by permission of the court of appeals upon application made directly to that court from a judgment or order of the appellate division, or of the court of original instance, which is not appealable as of right only because it does not comply with provisions (a), or (b), or (c) of subdivision one of section five hundred and eighty-eight of this act."

The fact that the Court of Appeals cannot grant leave to appeal where the appeal may be taken as of right is confirmed by the following: COHEN and KARGER, *"Powers of the New York Court of Appeals,"* p. 352; *Nash* v. *Lang*, 300 N. Y. 626 (1950).

An appeal as of right to the Court of Appeals can be taken within sixty days after the service of a copy of the order of the Appellate Division appealed from. Civil Practice Act § 592, subd. 1, provides as follows:

> "§ 592. LIMITATIONS OF TIME; PROCEDURE TO OBTAIN PERMISSION TO APPEAL. Appeals and applications for permission to appeal to the court of appeals pursuant to this article shall be subject to the following limitations of time:
>
> "1. An appeal as of right to the court of appeals must be taken within sixty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof. The party entering the judgment or order, or serving the notice of the entry thereof, shall not, however, be entitled to notice to limit his time to appeal."

A further provision of § 592 extends for an additional thirty days the time in which to appeal as of right to the Court of Appeals, where leave to appeal is denied on the ground that an appeal may be taken as a matter of right. This provision is contained in subd. 5(a) which reads as follows:

> "Notwithstanding any of the foregoing limitations
>
> (a) An appeal as of right to the court of appeals may be taken within thirty days after entry of an order denying an application for permission to appeal upon the ground that the appeal would lie as of right; * * *."

In any event, whether the petitioner was confined to the sixty-day period provided for in Subdivision 1 or had available the thirty-day extension period specified in Subdivision 5.A of § 592, the time in which to take an appeal as of right to the Court of Appeals has long since expired.

It is thus clear that the petitioner had an absolute right to appeal to the Court of Appeals and that he did not avail

himself of that right. Under those circumstances, it is pointless to speculate as to the reasons which prompted the denial by the Court of Appeals of the petitioner's motion for leave to appeal. For where a petitioner has failed to exhaust his remedies in the state courts, he cannot invoke the jurisdiction of this Court.

New York, April 22, 1955.

Respectfully submitted,

PETER CAMPBELL BROWN,
Corporation Counsel of the City of New York.

LEO A. LARKIN,
SEYMOUR B. QUEL,
DANIEL T. SCANNELL,
HELEN R. CASSIDY,
of Counsel.

IN THE

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October Term, 1954

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Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of JAMES R. ELLIS, by EMANUEL REDFIELD, his attorney, respectfully shows:

This is an application for a rehearing of the decision in this case by this Court dated June 6, 1955 (Chief Justice

Warren and Justices Black, Douglas, and Clark, dissenting).

Although this case had been previously reargued, it was done so on the Court's own motion. There are compelling reasons, other than the five to four ruling, that necessitates this application.

Upon the prior arguments the time allowed was almost wholly consumed with issues that now appear extraneous. What has been decided was barely touched upon.

(1)

What has been decided and is implicit in the Court's decision is that an organization or a person must plead and prove that the use of the building was granted to "other organizations of a similar character" (as applied to individuals, as distinct from organizations the implication is that the individuals had discussed similar subject matter).

This ruling, it is submitted makes empty the right to talk in such instances, as will be shown. Counsel for the petitioner in drafting his petition studiously and deliberately avoided an allegation that there had been previous use granted to "organizations of a similar character." Not only was this done to avoid the burden of proving such particularized use, but frankly, was fearful that a precedent such as has been enunciated by the Court would render nugatory as a practical matter, the right of equal treatment in the use of public buildings for speaking.

Until now, the rule as enunciated in the *Niemotko* case 340 U. S. 268 was that as to assertions of discrimination

all that had to be shown was that the site was devoted to the public use of assembly and speech on matters of public interest. This is alleged in paragraphs 14, 15, 16, 17 and 18 of the petition. It was deemed a sufficient allegation in order to obtain the right to talk, to show that others have been granted the right to talk. That is why the pleading is brief, but is not "empty."

The allegations of the pleading are deemed admitted by New York law, Section 1291, Civil Practice Act. They are clear and concise. Anything additional could have been criticized as cumulative, corroborative and redundant (cf. Section 1294, Civil Practice Act, which provides for motions against immaterial and redundant matter). It must be remembered that what is involved is a *pleading* and that if any triable issue had been raised by answer a trial for it is provided (Section 1295, Civil Practice Act).

What is now imposed by the Court's decision on an applicant is the burden to plead and prove that a *similar organization* had previously been granted the use (or a person had spoken on a similar topic before). Not only is this an impractical and nullifying burden, but it fails to consider that there is always a *first* occasion. For example in 1926, shortly after the American Civil Liberties Union was organized it was denied the use of a school building in New York for the purpose of discussion (Appeal of American Civil Liberties Union, 36 State Dept. Rep. 97). Had the American Civil Liberties Union been obliged to prove "that other organizations of a similar character" (to quote the Court's opinion) had been granted the use, it could not have done so, because the

organization was new and unique. Furthermore the means of probing into the past records of the board's grants of use would be lacking, either because there were no records, or, if any records existed, they would not reveal with clarity the nature of the organization (other than popularly known ones, such as the Democratic and Republican parties or the Red Cross, etc.) that had previous use. Their names would not necessarily tell their character. Neither would they necessarily reveal what the subject matter of discussion was. Here too, there is a practical difficulty in that even the title of an address may be misleading. For instance, should the records show that a topic was discussed under the title, "Constitutional Limitations," the talk itself might have been nothing but invectives against the police department.

Therefore, these insurmountable practical difficulties would have prevented the use by such a patriotic organization as the American Civil Liberties Union, whose object is to protect the conservative rights that have been won over the centuries and are inscribed in the Bill of Rights.

What was true for the American Civil Liberties Union is true for every organization and person. There is always a first time for a new type of organization.

Therefore, the rule found in the Niemotko case is the only meaningful and practical one,—that all that has to be shown is that the place was made accessible for public speech, and the petitioner was denied such use.

The pleading was framed with deliberation, to avoid the effect that five members of this Court has created. To win a free speech case on the burden of proof that has

been imposed by the decision is an empty victory. Should an applicant allege that his organization was a political organization and entitled to the use such as had been granted to other political organizations on prior occasions, he would then be met with a challenge to prove that his organization was a "political" one. How such proof would satisfy any administrative body or court, absent a definition of a "political" organization is in itself a problem.

To bring the matter back to the Chief Justice discussion at the several arguments. Suppose this petitioner called itself a Peace Party—(there is nothing to prevent it from so calling itself), it would then be confronted with queries: as to how votes it had obtained; when it obtained them; how it functions, etc., etc. A veritable Pandora's Box would thus be opened to prove extraneous issues.

Then, to add more difficulties to the supposed simple right of public speech, after the matter had worked its weary way through the Courts (this case, without such a burden of proof took three years) and a victory be gained it would be a pyrrhic and useless one, in most cases. The occasion for the speech by then would be gone.

Thus, the speaker on a novel matter, or indeed, the speaker on a "controversial" or unpopular subject is effectively silenced and suppressed.

It was this power to effectively suppress that was the concern of petitioner's counsel. By following *Niemotko*, as four justices of this Court presumably did, this Court would have adhered to a fairly simple rule for school boards and courts to administer, to wit,—if use for public speech is granted it is open to all. That is the meaning of our

constitutional history and the cases in this Court. Once you place the enormous and impractical burden on a speaker, such as enunciated here, you empower a public official to suppress the novel, the "controversial" and the unpopular.

Thus, by requiring the pleading and proof enunciated in this case, a weapon is placed in hands to eliminate the unpopular and "controversial", even if the Court had not intended to do so. The result in either case will be the same.

(2)

The Court overlooked petitioner's contention—which was the main argument in all courts—that the respondents censored and suppressed the petitioner. The allegations are contained in paragraph "18" of the petition. The arguments are found in Points I, II, III and IV of "Brief of Petitioner." The argument is that once public property is made accessible for public speech it is subjected to the constitutional guarantee of freedom from censorship, and that an administrative body must act with standards.

This argument is not related to the argument concerning unequal protection of the laws. True, as the Court's opinion states, the use was created by grace of the statute and could have been completely withheld. But, as petitioner argued, once the use is granted, constitutional protection attaches. This is the expression of *Marsh* v. *Alabama*, 326 U. S. 501, and the other cases cited in Brief of Petitioner, page 21, and other cases cited in that brief, pages 14-21.

The constitutional guarantee that is invoked is that the statute cannot be applied in such manner as to subject petitioner to censorship, by applying the statute without standards and with absolute discretion.

What the Court's decision overlooks is that petitioner contends that the respondents applied the statute without standards and exercised unfettered discretion against petitioner (and also on the grounds that the petitioner's organization is "controversial"). This point about the application of the statute was evidently overlooked in the absorption with the point that the *regulation's* vagueness was not attacked below. The opinion of this Court, page 2, speaks of "The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here." Nothing is said about petitioner's attack against the application of the statute in the manner argued in the "Brief of Petitioner," and raised below in the manner set forth on pages 4, 5 and 6 of "Brief of Petitioner," in "Reply Brief of Petitioner" pages 3, 4 and 5 and in "Supplemental Brief of Petitioner on Reargument" page 7.

Even if the regulations had never been enacted, there would still be before the Court the question whether respondent's conduct in censoring the petitioner by the exercise of unchanneled discretion was a denial of due process.

It is submitted that this question has not been answered by the disposition of the claim of discrimination. Absent a claim of discrimination, there would still be before the Court the question whether there is a violation of the protection of free speech by the unfettered exercise of power by the respondent.

Petitioner again urges that the validity of the regulations was before the lower courts and was raised in the manner set forth in "Brief of Petitioner," pages 4 and 5, in "Reply Brief of Petitioner", pages 3, 4 and 5 and in "Supplemental Brief of Petitioner," page 6.

Respectfully submitted,

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Certificate of Counsel

I, EMANUEL REDFIELD, counsel for the above named petitioner, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

EMANUEL REDFIELD,
Counsel for Petitioner.